Supreme Court, U.S.
FILED

No. 95 1168 JAN 22 1996

OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1995

ROBERT MARK ROSEN, D.O.,

*Petitioner,*

v.

IOWA BOARD OF MEDICAL EXAMINERS,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court Of Iowa**

## PETITION FOR WRIT OF CERTIORARI

CRAIG F. GRAZIANO,
Counsel of Record
JAMES W. O'BRIEN
DICKINSON, MACKAMAN, TYLER & HAGEN, P.C.
1600 Hub Tower
699 Walnut Street
Des Moines, Iowa 50309-3986
(515) 244-2600
Fax (515) 246-4550

*Counsel for Petitioner*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

90 pp

## QUESTION PRESENTED

In adjudicative proceedings before a state medical licensing agency on a charge of "fraud in procuring a license", did Iowa violate the procedural due process requirements of the Fourteenth Amendment when it first allowed the prosecutor, following the close of the evidence, to enlarge the charge and then refused to allow the applicant to enlarge the defense?

TABLE OF CONTENTS

Page

Question Presented ..... i

Table of Contents ..... ii

Table of Authorities ..... v

Opinions Below ..... 1

Jurisdiction ..... 1

Constitutional Provision Involved ..... 2

Statement of the Case ..... 2

A. Course of proceedings below ..... 2

B. Facts ..... 8

C. Opinions below ..... 10

Reasons for Granting the Writ ..... 14

A. The issue is important because (i) the failure of an administrative agency to notify an individual of the real charge against him produces a Kafkaesque secret trial in which the individual is denied an opportunity to present a responsive defense, (ii) the truth-seeking mission of the agency's adjudicative process is thereby frustrated, and (iii) the increased utilization of administrative agencies for adjudicative functions has increased the frequency with which the problem occurs. ..... 15

B. The issue is presented on a record of pristine simplicity, involving, among other things, the prosecutor's inexcusable delay in waiting until after the close of the evidence at trial before notifying the applicant of the real charge against him, despite the prosecutor's knowledge of the relevant circumstances six weeks prior to trial ..... 16

TABLE OF CONTENTS – Continued

Page

C. The decision of the state supreme court is erroneous because (i) it declines to mention and follow a long series of federal court decisions, including one from this Court, holding that the introduction of evidence relevant to an issue that is pleaded is not adequate to alert a party that a new issue is entering the case, and (ii) it fails to recognize that the reason Rosen did not present a responsive defense to the real charge against him at trial is that he received no notice of the real charge against him until after the trial was over ..... 17

D. The decision of the state supreme court is a gross miscarriage of justice because it assassinates Rosen's character by concluding without evidence that he is lacking in "honesty, integrity and judgment" and is of unsound "character" ..... 22

E. The decision of the state supreme court conflicts with *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353 (6th Cir. 1992) ..... 25

Conclusion ..... 26

Appendix

Exhibit A Opinion of the Supreme Court of Iowa October 25, 1995.....App. 1

Exhibit B Opinion of the Iowa District Court for Polk County March 25, 1994.....App. 16

TABLE OF CONTENTS – Continued

Page

Exhibit C Opinion of the Iowa Board of Medical Examiners June 3, 1993.....App. 30

Exhibit D Order of the Supreme Court of Iowa denying rehearing November 17, 1995.....App. 40

Exhibit E Order of the Iowa Board of Medical Examiners denying rehearing July 1, 1993 .....App. 41

Exhibit F Rosen's opening brief to the Supreme Court of Iowa (fragment) August 25, 1994 .....App. 42

Exhibit G Rosen's opening brief to the Iowa District Court for Polk County (fragment) November 23, 1993.....App. 50

Exhibit H Board's response to Rosen's request for more definite statement October 1, 1992 .....App. 57

# TABLE OF AUTHORITIES

Page

CASES

*Ali v. Division of State Athletic Comm'n*, 316 F. Supp. 1246 (S.D.N.Y. 1970) ..... 21

*Barnes v. Healy*, 980 F.2d 572 (9th Cir. 1992) ..... 20

*Burns v. Board of Nursing*, 495 N.W.2d 698 (Iowa 1993) ..... 23

*Chicago Cable Communications v. Chicago Cable Commission*, 879 F.2d 1540 (7th Cir. 1989) ..... 15

*City of Davenport v. Public Employment Relations Bd.*, 264 N.W.2d 307 (Iowa 1978) ..... 23

*Cook v. City of Price*, 566 F.2d 699 (10th Cir. 1977) .... 20

*Gilchrist v. Bierring*, 234 Iowa 899, 14 N.W.2d 724 (1944) ..... 15

*Jimenez v. Tuna Vessel Granada*, 652 F.2d 415 (5th Cir. 1981) ..... 18

*In re Application for Licensure of Knapp*, No. 02-92-096 (Iowa Bd. Med. Exam. 1992) ..... 21

*Smith v. California State Board of Pharmacy*, 37 Cal.App.4th 229, 43 Cal.Rptr.2d 532 (1995) ..... 19

*United States v. White*, 879 F.2d 1509 (7th Cir. 1989) .... 20

*Universal Camera Corp. v. National Labor Relations Bd.*, 340 U.S. 474 (1951) ..... 23

*Yellow Freight System, Inc. v. Martin*, 954 F.2d 353 (6th Cir. 1992) ..... 25

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., amend. XIV, § 1 ..... 2

Iowa Code § 147.49 (1995) ..... 9

## PETITION FOR WRIT OF CERTIORARI

Petitioner Robert Mark Rosen, D.O., respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Iowa entered in the above case on October 25, 1995, as corrected by the order dated November 17, 1995.

## OPINIONS BELOW

The opinion of the Supreme Court of Iowa, dated October 25, 1995, affirming the judgment of the Iowa District Court for Polk County, is included in the Appendix as Exhibit A. The correction order of the Supreme Court of Iowa, denying rehearing, dated November 17, 1995, is included in the Appendix as Exhibit D. The opinion of the Supreme Court of Iowa, as corrected, is reported at 539 N.W.2d 345 (Iowa 1995). The opinion of the Iowa District Court for Polk County, dated March 25, 1994, affirming the decision of the Iowa Board of Medical Examiners, is included in the Appendix as Exhibit B. The opinion of the Iowa Board of Medical Examiners, dated June 3, 1993, is included in the Appendix as Exhibit C. The order of the Iowa Board of Medical Examiners denying rehearing, dated July 1, 1993, is included in the Appendix as Exhibit E.

## JURISDICTION

The decision of the Supreme Court of Iowa was issued October 25, 1995. An order denying rehearing was

issued November 17, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution provides: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . . "

## STATEMENT OF THE CASE

### A. Course of proceedings below.

On April 20, 1992, the respondent Board denied petitioner Rosen's application for an Iowa medical license. The reason for denial was "failing to make full, complete and accurate disclosures" in "SECTION 11" of the application, "[MEDICAL] RESIDENCIES". Rosen filed requests for hearing and for more definite statement, the latter reciting: "a more definite statement of the reason for denial is necessary in order to facilitate [Rosen's] preparation for the hearing".

On October 1, 1992, the Board issued a more definite statement, *infra* Exhibit H, reciting: (1) Rosen inaccurately stated in answer to section 11 of the application that he served a preceptorship in dermatology under D.P. Knapp, M.D. at Moline, Illinois from July 1988 to June 1991; and (2) "failure to make full, complete and accurate disclosures . . . constitutes fraud in procuring a license".

On March 18, 1993, at an informal conference requested by Rosen, Rosen through counsel explained the

circumstances of the Knapp preceptorship. He explained that he met the requirements for licensure independently of the preceptorship. He volunteered the fact that he signed the application in blank, with the expectation that it would be completed on his behalf by preceptor Knapp.

On April 29, 1993, the matter was tried to the Board. Early in the hearing (tr. 21-23), a Board member observed that the answer to question 14T omitted a malpractice action. The administrative law judge explained that "the basis for the denial was question 11" so "we're going to have to confine our record to question 11 today". The prosecutor and a Board investigator explained that the malpractice issue had been resolved.

There were no significant conflicts in the relatively scant evidence. Rosen testified on his own behalf as the principal witness. The state offered brief testimony from two witnesses, one by telephone, substantially all of it concerning the preceptorship. Rosen offered 19 exhibits, most concerning the preceptorship, including his application, which was the only exhibit offered by the state and was treated as a joint exhibit. The prosecutor waived opening statement.

Following the close of the evidence, without prior notice to Rosen, the state moved to amend the charge to include the fact that Rosen had signed the application in blank as an additional specification of fraud. Rosen resisted the motion. The transcript reads (pp. 82-87):

> ADMINISTRATIVE LAW JUDGE: Okay. Any other questions for Dr. Rosen? Do we have any other testimony or evidence for the applicant?

MR. GRAZIANO [ROSEN'S COUNSEL]: No.

ADMINISTRATIVE LAW JUDGE: Okay. No rebuttal?

MS. McGUIRE [PROSECUTOR]: No.

ADMINISTRATIVE LAW JUDGE: We could have closing statements if you wish. Does the State wish to make a closing statement?

MS. McGUIRE: Yes, but before I make a closing statement, I would like to make a motion, and I'll be honest. I'm not sure procedurally how to do this. I would like to make a motion to amend [the Board's] more definite statement to include the issue of signing a blank application form as being one of the factual bases to constitute fraud in obtaining a license.

MR. GRAZIANO: We'd resist that as being untimely and as not having had an opportunity to prepare for it.

MS. McGUIRE: Well, it's based solely on the evidence presented by Dr. Rosen today. . . . The more definite statement that was issued by the board stated that the denial was based solely on the answer to question 11 pertaining to the residency. I think, based on the information as presented today, the board could have ample grounds to also deny the license based on the fraudulent statement when Dr. Rosen signed the application blank. . . .

MR. GRAZIANO: I would also like to state that this was all disclosed at the informal conference a month ago. And the State has had ample time to amend or give notice, and they waited until the last moment. . . . It . . . strikes me as

> being unfair to change the nature of the case at the last minute. . . .

As Board members discussed the motion, one of them volunteered: "I think this is fraud". The administrative law judge admonished him: "I guess I don't want you to make a conclusion". The administrative law judge provisionally granted the motion, subject to Board review. Four days later, Rosen filed a written resistance to the motion, specifically raising the procedural due process issue.[1]

On June 3, 1993, the Board issued its decision, *infra* Exhibit C, granting the motion, in the process rejecting

---

[1] The resistance recited:

> If granted, the untimely motion would deny [Rosen] his constitutional right to procedural due process. . . . Without being technical and still espousing a liberal procedure for processing administrative complaints, the courts have held that a charged party must be given fair notice of the violations charged, that the time for giving such notice is prior to the hearing, and that failure to provide such notice is not consonant with administrative due process or fundamental fairness. *Boyle's Famous Corned Beef Co. v. National Labor Relations Bd.*, 400 F.2d 154, 163-65 (8th Cir. 1967). While the cases recognize that issues fully and fairly litigated by the parties may be decided whether or not specifically pleaded, they reject the notion that mere litigation of the underlying facts constitutes such a full and fair litigation in the absence of prior notice of the specific charge, and they hold instead that the respondent is entitled to know what he is on trial for. *Drug Packages, Inc. v. National Labor Relations Bd.*, 570 F.2d 1340, 1345 (8th Cir. 1978); *National Labor Relations Bd. v. Blake Construction Co., Inc.*, 663 F.2d 272, 280 (D.C. Cir. 1981).

Rosen's due process argument although not specifically addressing it, and ruling that Rosen had perpetrated a fraud. Rehearing was sought and denied.[2] The order denying rehearing, *infra* Exhibit E, recited that Rosen could submit a new application for licensure. Notice of the determination that Rosen had submitted a fraudulent application was widely disseminated.[3]

Rosen sought judicial review. Among other issues, he challenged the ruling allowing amendment on multiple related grounds, including "a violation of Rosen's right under the federal . . . constitution[] to due process of law". The petition for judicial review (¶ 21(B)) recited:

> The Board's action, insofar as it rests upon the charge alleged in the motion to amend, (1) is made upon an unlawful procedure, (2) is affected by error of law, (3) is in violation of

---

[2] The application for rehearing: (1) cited a statement in the Board's decision that "[a]ll of the questions on the application are material"; (2) alleged on information and belief that there are numerous cases in which the Board has not treated every answer on an application as material; (3) alleged on information and belief that the consequent disparate treatment is arbitrary and capricious and without rational basis in law or fact, in violation of Rosen's right to equal protection of the laws; and (4) sought an opportunity for discovery on these allegations.

[3] The Board sent the decision to the Federation of State Medical Boards in Houston, Texas, which in turn notified the licensing bodies in all states, including New Jersey, where Rosen is currently practicing, that Iowa had denied licensure on the basis of a fraudulent application. The Federation similarly notified the American Medical Association, the American Osteopathic Association, the Department of Health and Human Services and other federal and state agencies with disciplinary, investigative or law enforcement responsibilities.

> statute and regulation, and (4) is in violation of Rosen's rights under the federal and state constitutions to due process of law. The motion to amend was untimely and without notice to Rosen. It did not comport with the statutory and regulatory provisions governing statement of charges. . . . The facts underlying the charge alleged in the motion to amend were made known to the State and the Board six weeks prior to the hearing. The motion to amend could easily have been made prior to the hearing. The Board's granting of the motion deprived Rosen of due process and fundamental fairness . . . by denying him . . . notice and an opportunity to prepare and present a defense in response to the charge against him. . . .

Rosen's brief to the district court, *infra* Exhibit G (fragment), similarly challenged the amendment on multiple related grounds, including constitutional due process grounds, citing federal due process precedents, among others. The district court, *infra* Exhibit B, rejected the challenge in its entirety, in the process rejecting Rosen's due process argument although not specifically addressing it, and affirmed the judgment of the Board.

Rosen's brief to the state supreme court, *infra* Exhibit F (fragment), similarly challenged the amendment on multiple related grounds, including constitutional due process grounds, citing federal due process precedents, among others. The court, *infra* Exhibit A, rejected the challenge in its entirety, specifically rejecting the due process argument, and affirmed the judgment of the district court. The case was argued to a panel of five justices but considered by all nine. One justice dissented without

opinion. Rehearing was sought and denied, *infra* Exhibit D.

**B. Facts.**

The only requirement for Iowa licensure relative to internship or residency is a requirement that an applicant have completed an accredited one-year internship or an accredited one-year residency. Rosen met this requirement twice over without regard to the Knapp preceptorship by virtue of a prior internship in New Jersey and a prior residency in New York.

The Knapp preceptorship was regulated by the American Osteopathic Association ("AOA"). By letter dated March 31, 1989 (trial ex. 8), the AOA gave first-step or "programmatic" approval to all three years of the preceptorship (August 1988 through July 1991). By subsequent letters, the AOA gave second-step or "final" approval to the first two years. Problems had begun in April 1989, however, when Knapp sold his practice to Bezhad Mohit, M.D. Conflicts developed between Knapp and Mohit. At the end of June 1990, as the third year was about to begin, Mohit discharged Knapp, and Knapp permanently left the site. Rosen continued to work at the site but was unsure whether it would be appropriate to submit the third year for final approval.

Knapp suggested that Rosen submit the third year as an elective year. Rosen contacted James D. Bernard, D.O. of Georgia, chairman of the responsible committee at the American Osteopathic College of Dermatology, and explained the situation to him. Bernard advised Rosen that Rosen would be better off seeking a new preceptor

for the third year (trial ex. 11). Rosen took Bernard's advice and obtained a new preceptor, Stewart Chalamidas, M.D. of California, for a third year beginning August 1991 and ending July 1992 – temporally a fourth year. The year under Chalamidas in due course received both programmatic and final approval. Rosen passed his exam and was certified in dermatology.

Meanwhile, in 1991, Knapp sought to hire Rosen for a practice Knapp was starting in Iowa. When Rosen responded that he had no Iowa license, Knapp suggested he obtain one. Eventually, Knapp showed up at Rosen's door with a blank application and asked him to sign it: "I'll get all the credentials and documents. If you sign it, I'll take care of everything". Rosen acceded to Knapp's request and signed the application in blank. The application was completed by Knapp.

Rosen trusted preceptor Knapp and expected that the application would be completed correctly. He thought it was "just a matter of filling out the paperwork" or "putting the right information in the right blanks". He had completed other applications, had never had a problem and was licensed in New York and Illinois.[4] There was no evidence that he had anything to gain by submitting a fraudulent application. At oral argument before the state supreme court, on questioning by the dissenting justice,

---

[4] Rosen's application was an application for licensure by endorsement to New York and Illinois. Licensure by endorsement is similar to licensure by reciprocity but does not require reciprocal agreements between the states. Iowa Code § 147.49 (1995).

the state conceded there was no evidence of scienter or intent to deceive with regard to the preceptorship.[5]

**C. Opinions below.**

The Board's decision, insofar as it addressed the charge as originally framed, ruled adversely to Rosen on the elements of falsity and materiality. On falsity (App. 37), the Board erroneously[6] stated that Rosen "concedes that the answer [to question 11] is inaccurate". On materiality (App. 38), the Board ruled: "[a]ll of the questions on the application are material". Insofar as it addressed the charge as originally framed, the Board did not make, and (as the state later conceded) the evidence did not permit, rulings adverse to Rosen on the elements of scienter or intent to deceive.

The Board's decision therefore necessarily rested on the charge as amended. The Board rejected Rosen's arguments that the state's amendment should be disallowed (App. 37). Although "the state could have made its motion prior to the hearing", the Board said, "the timing

---

[5] Rosen contacted Bernard prior to the time he submitted the Iowa medical license application. The fact that he did so perhaps helps explain why the state made this concession.

[6] Rosen's position on falsity was that the state had the burden of proof, that it jumped without evidence from the fact that Knapp left the preceptorship site to the conclusion that Rosen did not "serve" the third year of the preceptorship, and that no one knows whether the AOA would have granted final approval for the third year had Rosen sought it. See lower court brief at 23-25 & n. 11.

of the amendment did not prejudice [Rosen]". The signing of the application in blank "was raised by [Rosen]". He "was prepared to address the issue because he was the one who raised it".

The Board then ruled on the merits that Rosen had indeed perpetrated a fraud (App. 38-39). Rosen, the Board said, "intentionally signed an application, attesting to its truth, when it did not yet contain any information". He "never reviewed the answers given for their truthfulness, but signed the application as if he had". The application "was submitted as though [he] had attested to the truth of its contents, when in fact he had no actual knowledge of its contents". He "intentionally perverted the truth . . . by signing the attestation on the application form when the form was blank, and he failed to subsequently review the answers on the form for their truthfulness".

The district court (App. 26-27) upheld the Board's ruling allowing the amendment on largely the same basis as the Board, adding that the amendment "did not change the issue . . . in anyway" (*sic*). On the merits, the district court, taking an approach neither suggested by the Board nor argued on behalf of the state, ruled (App. 22-25) that the Board's decision could be sustained on the basis of "constructive fraud" and hence without proof of intent to deceive: "[a]n applicant's reason or motive in signing a blank application [is] irrelevant. . . . "

The state supreme court did not mention "constructive fraud". Insofar as it addressed the charge as originally framed, the court ruled adversely to Rosen on the

issue of falsity. The application, the court incompletely[7] observed (App. 2), "made no mention of the fact that the AOA had approved only two years of Rosen's tenure in Moline or that Rosen had completed the preceptorship elsewhere". Insofar as it addressed the charge as originally framed, the court did not make rulings adverse to Rosen on the elements of materiality, scienter or intent to deceive. In fact, on materiality, the court conceded to Rosen (App. 11) that " . . . the facts to which he swore were not, standing alone, material to the question of licensure".

Like the Board's decision, the court's decision therefore necessarily rested on the charge as amended. The court upheld the Board's order allowing the amendment (App. 5-6) on a reasoning that "[t]he amendment merely enlarged the factual basis supporting the charge" without "alter[ing] the legal issues presented [or] subject[ing] Rosen to new and distinct charges". "*All* of the evidence . . . was furnished by Rosen himself", the court said (emphasis in original). "Rosen is no position to complain of surprise or prejudice". "This is not a case in which a search for the truth became a trap for the unwary". "No denial of due process has been shown".

On the merits, the court's decision is difficult to capsulize in a few words. "Rosen argues", the court

---

[7] The court declined to mention the fact that the AOA had given initial or programmatic approval to all three years of Rosen's tenure in Moline. The court overlooked the fact that Rosen *had not* completed the third *(i.e.,* temporally fourth*)* year elsewhere at the time the application was submitted.

erroneously[8] stated (App. 9), "that it was Knapp, not he, who deceived the board". A reasonable fact-finder, the court held (App. 11), can make a sustainable finding of intent to deceive based solely on "tender[ing] a false affidavit". Rosen's materiality argument, the court held (App. 11), "begs the larger question of whether an applicant's honesty, integrity, and judgment – as demonstrated in the licensure process or anywhere else – are material". The court added: "[w]e are unwilling to hold . . . that the board must regard Rosen's *admitted* dishonesty as immaterial just because the facts to which he swore were not, standing alone, material to the question of licensure" (emphasis added).

The court effectively amended the charge still further, even at that late stage in the proceedings, by twice complaining (App. 2, App. 12) that Rosen had omitted a malpractice action from his response to application question 14T. That issue had lain moribund since the administrative law judge had ruled it out of order early in the trial.

Rosen began an eight-page application for rehearing as follows (emphasis in original):

> The Court states (page 10) that Rosen "admitted" "dishonesty". This statement leaves an impression that Rosen presented a hair-

---

[8] Rosen argued: "[t]he evidence . . . shows without contradiction that the representation . . . was made on Rosen's behalf by Knapp and that Knapp thought that the representation was true". Brief at 27.

> splitting defense that his action, although admittedly dishonest, was not intended to be deceptive. Rosen admitted, among other things, that he signed the application in blank. He did not admit that signing the application in blank was dishonest. He maintained and continues to maintain that neither signing the application in blank nor any other act on his (or anyone's) part was either dishonest or deceptive. His defense was "poor judgment, but not dishonest". There was no *admitted* dishonesty.

In its order denying rehearing (App. 40), the court corrected its opinion by deleting the word "admitted".

## REASONS FOR GRANTING THE WRIT

The real charge against Rosen was not a charge that he committed a fraud by misrepresenting a preceptorship but rather a charge that he committed a fraud by signing an application without reviewing its completed contents. Rosen did not defend the real charge at the trial because the state did not provide notice of the real charge until after the trial was over. In the face of repeated protests of constitutional error, the lower tribunals erroneously insisted that Rosen had both had a fair trial and all but admitted his guilt.

The state supreme court, confessing at last that Rosen had not admitted his guilt, painted an unsupported and false picture of Rosen as lacking in "honesty, integrity and judgment" and being of unsound "character". It is a picture of oppression and a picture that proves what the state supreme court once taught: without procedural due

process, no one is safe from oppression wherever power may be lodged, one can easily be deprived of important rights with no opportunity to defend against wrongful accusations, and the most precious rights of the citizen are subverted. *Gilchrist v. Bierring*, 234 Iowa 899, 915, 14 N.W.2d 724, 732 (1944).

Unless by grace of this Court, Rosen is not safe from oppression. If he is not safe, no one is safe, and the most precious rights of the citizen are indeed subverted.

**A. The issue is important because (i) the failure of an administrative agency to notify an individual of the real charge against him produces a Kafkaesque secret trial in which the individual is denied an opportunity to present a responsive defense, (ii) the truth-seeking mission of the agency's adjudicative process is thereby frustrated, and (iii) the increased utilization of administrative agencies for adjudicative functions has increased the frequency with which the problem occurs.**

The case of Robert Rosen is the case of every individual who is called before an administrative tribunal on a charge of misconduct, who prepares and presents himself for trial on that charge, and who discovers only after the trial has been completed that he was secretly on trial for something else. The recurrent problem has been aptly described as Kafkaesque. *Chicago Cable Communications v. Chicago Cable Commission*, 879 F.2d 1540, 1546 (7th Cir. 1989).

As adjudicative responsibilities are increasingly entrusted to administrative tribunals, it becomes increasingly important that the courts give effect to the procedural safeguards of the due process clause as they apply in the administrative setting. A decision from this Court addressing the issue would provide instructive guidance for, and improve the workings of, an untold number of agencies, thereby benefiting the population at large.

**B. The issue is presented on a record of pristine simplicity, involving, among other things, the prosecutor's inexcusable delay in waiting until after the close of the evidence at trial before notifying the applicant of the real charge against him, despite the prosecutor's knowledge of the relevant circumstances six weeks prior to trial.**

The issue arises on a record of pristine simplicity, involving:

> (1) a request by the applicant for a more definite statement of the charge against him, filed six months prior to trial, for the stated purpose of facilitating preparation for trial;
>
> (2) a volunteered disclosure by the applicant, six weeks prior to trial, of a fact not previously known to the prosecutor, and the prosecutor's consequent inability to claim that the volunteered fact came as a surprise to the prosecutor;
>
> (3) the prosecutor's inexcusable delay in waiting until after the close of the evidence at trial before seeking an amendment enlarging the

charge to include an allegation based on the fact previously volunteered by the applicant;

(4) relevance of the volunteered fact to the applicant's defense to the charge as originally framed, and a consequent lack of notice to the applicant that the agency was trying him on the charge as amended (see C *infra*); and

(5) devastating prejudice to the applicant as a result of the amendment, to the point of unsupported character assassination at the hands of the state's highest court (see D *infra*).

The complete trial transcript is 98 pages. The case affords an optimal occasion for addressing the issue.

**C. The decision of the state supreme court is erroneous because (i) it declines to mention and follow a long series of federal court decisions, including one from this Court, holding that the introduction of evidence relevant to an issue that is pleaded is not adequate to alert a party that a new issue is entering the case and (ii) it fails to recognize that the reason Rosen did not present a responsive defense to the real charge against him at trial is that he received no notice of the real charge against him until after the trial was over.**

The state supreme court began its discussion of the constitutional issue (App. 5) with an observation that the Board rested its decision "in part" on facts not mentioned in the charge as originally framed – almost as if to suggest that the Board's decision could be sustained on the charge as originally framed. Consideration of the constitutional issue properly begins with a recognition that the Board's decision *cannot* be sustained on the charge as

originally framed but rather depends for validity on the charge as amended, as the foregoing statement of the case shows.

Rejecting the constitutional claim, the court stated (App. 6): "Rosen is in no position to complain of surprise or prejudice". This statement is in error. The court was correct when it said that "[*a*]*ll* of the evidence" pertinent to the amended charge "was furnished by Rosen himself" (emphasis in original). The court erred, however, when it declined to mention and follow the long list of federal court decisions, including one from this Court, that were cited to it (App. 44-45 n. 16) – and to the district court (App. 51-53) – for the principle that the introduction of evidence relevant to issues that are pleaded is not adequate to alert a party that a new issue is entering the case. On the law, the interest that this principle advances is the constitutional interest in affording a litigant notice and a meaningful opportunity to be heard. *Jimenez v. Tuna Vessel Granada*, 652 F.2d 415, 422 (5th Cir. 1981). On the facts, the evidence that Rosen signed the application in blank was relevant to, and was offered in defense of, the charge that was pleaded.[9]

---

[9] The opening statement by Rosen's counsel to the Board included the following (tr. 12):

> There is a third and final reason why the allegation of fraud cannot be sustained. Dr. Rosen did not knowingly supply false information because he did not supply the information at all. The person who did supply the information, Dr. Knapp, thought that the information was true.

Rosen's trial exhibits included an affidavit (trial ex. 14) from Knapp stating "[i]t was my belief . . . that Dr. Rosen had in fact served a residency . . . from July 1988 through June 1991" and

Rejecting the constitutional claim, the court stated (App. 6): "[t]his is not a case where a search for the truth became a trap for the unwary". This statement is in error. Following the Board's more definite statement, the task for trial, as it fairly appeared to Rosen, was to explain the apparent discrepancy regarding the preceptorship and – in light of the Board's patently erroneous premise that "failure to make full, complete and accurate disclosures . . . constitutes fraud in procuring a license" (App. 58) – to attempt to give the Board an awareness that there are elements to the law of fraud in addition to falsity. This, in a nutshell, is the defense that Rosen presented. The truth behind it is confirmed by the state's, the Board's and the lower courts' inability to penetrate it except by shifting the ground – *after the trial was over.*

Rejecting the constitutional claim, the court stated (App. 5): the amendment "merely enlarged the factual basis supporting the charge" without implicating due process requirements. This statement is in error. A correct analysis appears in *Smith v. California State Board of Pharmacy,* 37 Cal.App.4th 229, 242-43, 43 Cal.Rptr.2d 532, 539-40 (1995). In *Smith,* the prosecutor, recognizing his inability to prove the case on the original factual allegation (that Smith improperly dispensed drugs), shifted the

---

"that the third year would be treated as an 'elective' year". Rosen continued the argument throughout the proceedings below. His brief to the state supreme court argued (p. 27): "[t]he evidence . . . shows without contradiction that the representation . . . concerning the Knapp preceptorship was made on Rosen's behalf by Knapp and that Knapp thought that the representation was true"; "[t]here is no evidence that Rosen knowingly made any false statement".

case to another factual allegation (that Smith was responsible for the improper dispensing of drugs by others), giving no notice to Smith until closing argument. Answering Smith's question "[a]re we to abrogate the rules of due process because [the prosecutor] needs a fallback position?", the court ruled: "the accusation did not afford Smith the basic, appropriate elements of procedural due process", among them an accusation that "set[s] forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense". Smith "was misled".

So was Rosen. A party must be given a fair chance to plan his defense to meet pleaded allegations. *Cook v. City of Price*, 566 F.2d 699, 702 (10th Cir. 1977). The notice must give an agency's reason for its action in sufficient detail that the affected party can prepare a responsive defense. *Barnes v. Healy*, 980 F.2d 572, 579 (9th Cir. 1992). A responsive defense to a pleaded allegation that one has committed a fraud by signing a blank application, or by submitting a false affidavit or false attestation, or by not reviewing the contents of a completed application, does not focus on the preceptorship, as Rosen's defense did. It rather seeks to instill realism and hence fairness into the Board's decision-making process by focusing on the fact that many people sign documents, even solemn documents reciting that the signer signed with knowledge of the contents and under penalty of perjury, without reading them. *United States v. White*, 879 F.2d 1509, 1511 (7th Cir. 1989).

A responsive defense seeks to establish, with the aid of discovery, that the Board has received *many* applications with inaccurate or incomplete responses and hence false attestations and false affidavits, that the Board commonly has not brought charges of fraud in such cases, and in sum, that the Board by its actions has recognized that submission of a false affidavit or false attestation, or failure to review the contents of a completed application, is not by itself dishonest, deceptive or fraudulent. In addition, a responsive defense seeks to establish that there is no rational or non-arbitrary basis for singling out Rosen and hence that the charge against him cannot be sustained consistently with the need to afford him the equal protection of the laws. See *Ali v. Division of State Athletic Comm'n*, 316 F. Supp. 1246 (S.D.N.Y. 1970).

As indicated *supra* note 2, the defense described in the preceding paragraph is the defense Rosen sought to present on rehearing before the Board. The state supreme court (App. 14) upheld the Board's ruling denying rehearing on a rationale that Rosen had not made a sufficient showing that the Board treated him in an irrationally and arbitrarily discriminatory manner in comparison with other applicants.[10] The reason Rosen did not make such a showing is simple, however, and it lies at the heart of the case: the state did not give Rosen notice of the real charge against him until after the trial was over. Rosen did not

---

[10] In his brief to the state supreme court, Rosen did reference one other Board decision. *Knapp's* application failed to mention the same malpractice action that Rosen's application failed to mention. In Knapp's case, the Board found no intent to deceive and hence no fraud. *In re Application for Licensure of Knapp*, No. 02-92-096 (Iowa Bd. Med. Exam. 1992).

defend a charge that signing an application in blank constitutes fraud because there was no such charge to defend.

In upholding the Board's ruling denying rehearing, the state supreme court completed a process whereby Iowa gave the state an enlarged basis for attack but denied Rosen an enlarged basis for defense. It is little wonder the truth about Rosen (see D *infra*) was lost in the process.

**D. The decision of the state supreme court is a gross miscarriage of justice because it assassinates Rosen's character by concluding without evidence that he is lacking in "honesty, integrity and judgment" and is of unsound "character".**

The Board's decision (App. 38-39) rested on a conclusion that Rosen had misrepresented in the attestation clause that he had reviewed the contents of the completed application. Rosen argued (among other things) that the attestation clause contained only a representation that the completed application was true and correct and not a representation that he had reviewed its completed contents. The state supreme court rejected the argument (App. 10), ruling in effect that the attestation clause contained an implicit representation that Rosen had reviewed the completed application.

Having thus ruled that Rosen had misrepresented that he had reviewed the completed application, the court might have proceeded to consider whether *that* misrepresentation was material to licensure. Instead, employing an uncommonly deferential standard of review of agency

action,[11] the court proceeded to say that "honesty, integrity and judgment" are material to licensure and, in effect, *that Rosen had misrepresented that he possesses honesty, integrity and judgment* (App. 11, as corrected, App. 40):

> Rosen's argument [on materiality] begs the larger question of whether an applicant's honesty, integrity, and judgment – as demonstrated in the licensure process or anywhere else – are material to decisions made by a licensing board. We have no reason to question the board's judgment that they are. Moreover, we are unwilling to hold, as a matter of law, that the board must regard Rosen's ~~admitted~~ dishonesty as immaterial just because the facts to which he swore were not, standing alone, material to the question of licensure.

---

[11] Compare *Burns v. Board of Nursing*, 495 N.W.2d 698, 699 (Iowa 1993) (emphasis added) ("[w]eight of the evidence remains within the agency's *exclusive* domain"; "[t]he rule [that we consider all the evidence together, including the body of evidence opposed to the agency's view] merely means that support for the agency finding can be gathered from any part of the evidence") with *City of Davenport v. Public Employment Relations Bd.*, 264 N.W.2d 307, 311 (Iowa 1978), quoting *Universal Camera Corp. v. National Labor Relations Bd.*, 340 U.S. 474, 488 (1951) (the reviewing court "must take into account whatever in the record detracts from [the] weight [of the evidence relied on by the agency]"; "[t]his is clearly the significance of the requirement . . . that courts consider the whole record"). On January 5, 1996, the board of governors of the Iowa State Bar Association approved for inclusion in its legislative program a proposed new Iowa administrative procedure act that would restore the earlier standard of review.

In a subsequent portion of its opinion (App. 14), the court further disparaged Rosen's character, finding no abuse of discretion in the Board's denial of rehearing, as well a defect in Rosen's complaint about disparate treatment, based on *"the substantial evidence in the record bearing on Rosen's character"* (emphasis added). There can be no mistaking the court's meaning: the court meant to say substantial evidence in the record bearing *adversely* on Rosen's character.

That honesty, integrity and judgment are material to licensure, all admit. If not from the single act of signing the application in blank, however, where derives the notion that Rosen is lacking in honesty, integrity and judgment? If not from the single act of signing the application in blank, where is the supposedly substantial evidence in the record bearing adversely on his character? Certainly, if there have been acts in his life other than signing this application in blank that allegedly bear adversely on his character, the state, which rightly bore the burden of proof, had ample opportunity to present evidence concerning them and can cite it in response to this petition. There is no such evidence.

The court overlooked substantial evidence in the record bearing *favorably* on Rosen's character. He forthrightly brought the problem with the Knapp preceptorship to the attention of the body with jurisdiction over it (the AOA) and responsibly took its advice. He requested an informal conference and forthrightly volunteered the circumstances under which the application was signed. He testified without contradiction that his life has otherwise been free of problems that called his character into question (tr. 89-90). Although the burden was the state's,

not his, he produced a colleague's affidavit attesting to his good character.

A single error in judgment does not destroy an individual's honesty and integrity or his judgment generally. If it did, none would escape condemnation. The decision of the state supreme court is an unsupported assassination of Rosen's character and, as such, a gross miscarriage of justice.

**E. The decision of the state supreme court conflicts with *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353 (6th Cir. 1992).**

The decision of the state supreme court conflicts with *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357-58 (6th Cir. 1992), which held:

> The fundamental fairness inherent in administrative due process cannot permit the [government] to plead a certain charge, insist at hearing that only that charge is being litigated, and then raise a related, but more onerous charge, only after the hearing record is closed.

The importance of the question is addressed *supra* at A, C and D.

## CONCLUSION

The writ should be granted.

Respectfully submitted,

CRAIG F. GRAZIANO,
Counsel of Record
JAMES W. O'BRIEN
DICKINSON, MACKAMAN, TYLER & HAGEN, P.C.
1600 Hub Tower
699 Walnut Street
Des Moines, Iowa 50309-3986
(515) 244-2600
Fax (515) 246-4550

*Counsel for Petitioner*

**EXHIBIT A**

**IN THE SUPREME COURT OF IOWA**

No. 125/94-691

Filed October 25, 1995

**ROBERT MARK ROSEN,**

Appellant,

vs.

**BOARD OF MEDICAL EXAMINERS OF THE STATE OF IOWA,**

Appellee.

---

Considered en banc.

**NEUMAN, Justice.**

This controversy centers on the meaning of "fraud in procuring a license," the reason given by the Iowa Board of Medical Examiners for denying Robert Rosen's application to practice medicine in Iowa. The district court upheld the board's decision on judicial review. Rosen now appeals, claiming the board erroneously equated inaccuracy with fraud. Finding no error, we affirm.

The facts are undisputed. Rosen is a graduate of Rutgers University and the New York College of Osteopathic Medicine. In 1987, he successfully completed a one-year internship at Kennedy Memorial Hospitals in New Jersey, followed by a one-year family practice residency in Brooklyn, New York. He was certified by the American Osteopathic Board of General Practice in 1989.

In August 1988, Rosen began what he thought would be a three-year preceptorship in dermatology under the supervision of D.P. Knapp, M.D., in Moline, Illinois. The first two years of the preceptorship were approved by the American Osteopathic Association (AOA). However, during the third year, Knapp sold the practice and moved to Iowa. Rosen continued to work in Moline for another year but, at the suggestion of the AOA, completed the third year of his preceptorship with a doctor in California.

Meanwhile, Knapp began pressuring Rosen to join him in practice in Iowa. Rosen procrastinated in completing the required application form. Knapp eventually appeared on Rosen's doorstep with the form in hand, urging him to sign it in blank and assuring him that he would complete the form based on Rosen's curriculum vitae. Rosen agreed to Knapp's plan and the application was submitted to the board for approval.

The form submitted by Rosen, via Knapp, erroneously stated that Rosen had completed a three-year dermatology preceptorship under Knapp's supervision. It made no mention of the fact that the AOA had approved only two years of Rosen's tenure in Moline, or that Rosen had completed the preceptorship elsewhere. Several questions on the application were also left unanswered. Left blank were inquiries about pending investigations by other state licensing boards and whether Rosen had ever been sued for malpractice. (The record reveals that Rosen was, in fact, named as a codefendant in a suit along with Knapp.) The application also sought information not customarily found on a resume, such as questions about

substance abuse and criminal convictions. Knapp apparently answered these queries based on his acquaintance with Rosen.

Following its investigation, the board advised Rosen by letter that it was denying licensure based on Rosen's failure to make "full, complete and accurate disclosures" regarding section 11 of the form, residencies. Rosen filed a notice of appeal and moved for more specific statement. The board responded with further detail about the discrepancies that had surfaced concerning Rosen's residencies. Rosen also sought an informal hearing with board staff and legal counsel. The informal hearing yielded a concession by Rosen's counsel that the inaccuracy stemmed from the form having been signed in blank, Rosen's certification to the contrary notwithstanding.[1] This explanation failed to resolve the matter and the case proceeded to contested hearing.

Rosen testified in his own behalf at the hearing. He explained that the inaccuracies and incomplete information in his application resulted from the fact that he foolishly entrusted Knapp with the responsibility of filling it out. He conceded that the application contained an affidavit, signed by him, certifying under penalty of perjury that the information contained therein was true and correct. He professed no knowledge about who might have notarized his signature. He expressed regret at his lack of good judgment but maintained that he had no

---

[1] The affidavit signed by Rosen read: "I, Robert Rosen, being duly sworn state, under penalty of perjury, that the foregoing information contained in this application and any attachment is true and correct. . . . "

intent to deceive the board by the information provided or omitted.

At the close of evidence, the State moved to amend the board's more specific statement "to include the issue of signing a blank application form as being one of the factual bases to constitute fraud in obtaining a license." The motion was granted over Rosen's objection that it was untimely.

The board found Rosen violated Iowa Code section 258A.10 (1991),[2] fraud in procuring a license, by

> intentionally pervert[ing] the truth in making his application for medical licensure in Iowa, by signing the attestation on the application form when the form was blank, and [failing] to subsequently review the answers on the form for their truthfulness.

The district court affirmed the board's decision on judicial review and this appeal by Rosen followed.

I. Our decision is largely controlled by the limited scope of our review. What we said in a recent licensing case bears repeating here:

> A court's review of agency action is severely circumscribed. The administrative process presupposes that judgment calls are to be left to the agency. Nearly all disputes are won or lost there. Thus the court may reverse, modify, or grant other appropriate relief only if agency action is affected by error of law, is unsupported

---

[2] This statute has since been transferred to chapter 272C. *See* Iowa Code § 272C.10 (1993).

> by substantial evidence in the record, or is characterized by abuse of discretion.

*Burns v. Board of Nursing*, 495 N.W.2d 698, 699 (Iowa 1993) (citations omitted).

II. The first issue is whether the board properly rested its decision, in part, on facts not mentioned in the original denial of licensure or in its response to Rosen's motion for more specific statement. Both these documents referenced only Rosen's failure to make full, complete and accurate disclosures concerning residencies. Once Rosen tendered his defense of signing the form in blank, however, the State successfully moved to add another ground upon which its fraud claim could rest. Rosen claims on appeal that permitting the amendment violated his right to procedural due process. Our review of such a constitutional claim is de novo. *Freeland v. Employment Appeal Bd.*, 492 N.W.2d 193, 195 (Iowa 1992).

The crux of Rosen's claim is that the amendment changed, without notice, the issue being tried. Like the district court, we disagree with his contention. At all times the issue was whether Rosen's application for licensure could be denied on the basis of fraud in its procurement. The amendment merely enlarged the factual basis supporting the charge. It neither altered the legal issues presented nor subjected Rosen to new and distinct charges. *Cf. Committee on Professional Ethics & Conduct v. Wenger*, 454 N.W.2d 367, 369 (Iowa 1990) (lawyer entitled to separate notice and hearing on charge of false testimony stemming from statements made during trial on charges of professional neglect and failure to respond to grievance committee); *Weiner v. Board of Regents*, 158

N.Y.S.2d 730, 734-35 (App. Div. 1956) (doctor, faced with discipline based on criminal income tax evasion charge, could not be disciplined without notice on amended charge of fee splitting that stemmed from his own testimony).

As noted by the district court, Rosen is in no position to complain of surprise or prejudice. *All* of the evidence pertinent to the false affidavit was furnished by Rosen himself. Rosen nevertheless claims that, with proper notice, he "could have altered his preparations to meet the *new charge* head on." (Emphasis added.) Given his defensive posture in this case, we find the argument untenable. No new charge was filed. This is not a case in which a search for the truth became a trap for the unwary. *See Wenger*, 454 N.W.2d at 369. No denial of due process has been shown.

III. Iowa Code section 147.4 grants the Iowa Board of Medical Examiners authority to deny licensure on the "grounds for which a license may be revoked or suspended." Iowa Code section 147.55(1) provides that a license may be revoked or suspended for "[f]raud in procuring a license." The term "fraud in procuring a license" is defined at 653 Iowa Administrative Code 12.4(1) as conduct including, but not limited to

> an intentional perversion of the truth in making application for a license to practice medicine and surgery, . . . and includes false representations of a material fact, whether by word or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed when making application for a license in this state, or attempting to file or filing with

> the board . . . any false or forged diploma, or certificate or affidavit or identification or qualification in making an application for a license in this state.

Rosen cites error in the board's application of this standard, claiming the definition departs from the common law definition of fraud. In a common law action for fraud, the following elements must be proven: (1) a material misrepresentation, (2) made knowingly (scienter), (3) with intent to induce the plaintiff to act or refrain from acting, (4) upon which the plaintiff justifiably relies, (5) with damages. *Hoefer v. Wisconsin Educ. Ass'n Ins. Trust*, 470 N.W.2d 336, 340 (Iowa 1991); *see Garren v. First Realty, Ltd.*, 481 N.W.2d 335, 338 (Iowa 1992); *Hall v. Wright*, 261 Iowa 758, 766, 156 N.W.2d 661, 666 (1968). Rosen asserts that the board not only failed to consider these elements in its definition, the record does not support the board's finding of fraud as a matter of law. We shall consider the arguments in turn.

A. Although statutory construction is ultimately a judicial function, we are obliged to "give weight to an agency's construction of a statute so long as the agency does not purport to make law or change the meaning of the law." *Iowa S. Util. v. Iowa State Commerce Comm'n*, 372 N.W.2d 274, 277 (Iowa 1985). A presumption of validity attends any agency rule adopted pursuant to delegated authority. *Overton v. State*, 493 N.W.2d 857, 859 (Iowa 1992). Any challenge to that authority, to be successful, must be established by clear and convincing evidence. *Dunlap Care Ctr. v. Iowa Dep't of Social Serv.*, 353 N.W.2d 389, 393 (Iowa 1984). Rosen has not met that standard here.

It is generally held that laws enacted to protect the public from fraud need not codify the common law elements. Fraud is a generic term whose precise contours are often left undefined for the very purpose of giving tribunals the liberty to deal with it in whatever form it may present itself. *See* 37 Am. Jur. 2d *Fraud* § 1, at 18 (1968) ("the fertility of man's invention in devising new schemes of fraud is so great that courts have always declined to define it"); 37 C.J.S. *Fraud* § 1, at 204 (1943) ("the forms it may assume and the means by which it may be practiced are as multifarious as human ingenuity can devise"). Thus this court has recently held that an action brought under the Consumer Fraud Act need not rest on proof identical to that required to prove fraud at common law. *State ex rel. Miller v. Hydro Mag, Ltd.*, 436 N.W.2d 617, 621 (Iowa 1989). We reasoned that enforcement of the act, designed to protect the public, would be furthered by eliminating unessential elements. *Id.* We held it was sufficient, under the act, to show "a misrepresentation of any material fact with the intent that others rely on the misrepresentation." *Id.* at 622.

We nevertheless find little, if anything, to distinguish the elements of fraud as defined by the board's administrative rule from the rule as applied at common law. Both focus on an intent to deceive: in the administrative context by conduct amounting to "an intentional perversion of the truth" and in a civil action by "a material misrepresentation made knowingly." Consistent with common law, the administrative rule explicitly requires proof of materiality. *See* 653 Iowa Admin. Code 12.4(1) ("false representations of a material fact"). Because securing licensure is the only reason for submitting an application,

rule 12.4(1) parallels by implication the common law proof requirement of "intent to induce action or inaction." As for the element of reliance, the very form signed by Rosen warns that any license granted by the board "will be on the truth of the statements made herein, which if false will subject [applicant] to criminal prosecution and revocation [of the license]."

Iowa Code section 147.55 plainly authorizes the board to revoke or deny any medical license procured by fraud. Section 258A.10 (1991) directs licensing authorities to implement that statute by rule. We do not believe the definition of fraud contained in 653 Iowa Administrative Code 12.4(1) either exceeds the agency's statutory authority or substantially changes the meaning of the law. The definition clearly falls within the board's "reasonable range of informed discretion" to set standards. *Dunlap*, 353 N.W.2d at 393. No error of law has been shown.

B. The tougher question is whether the record supports a finding of fraud under the standard established by the board. Rosen insists that the board, from the outset, erroneously equated inaccuracy with fraud. In support of his position, he argues strenuously that a reasonable person could not rightly characterize his conduct as fraudulent because (1) he had no intent to deceive, (2) the misrepresentations on his application were not material, and (3) the requisite proof of scienter is missing. None of the arguments can bear close scrutiny.

1. *Intent.* Rosen argues that it was Knapp, not he, who deceived the board. Claiming he intended at all times to furnish only accurate information, Rosen asserts that but for Knapp's unexpected errors, this controversy

would not have arisen. Attempting to further shed responsibility for the contents of the application, Rosen boldly claims that the attestation clause he signed "contained no representation that [he] had reviewed the answers for their truthfulness."

In essence Rosen claims that he cannot be charged with intentionally deceiving the board because, at the time he attested to the truthfulness of his answers, he in fact had no knowledge of what the answers were. Such sophistry has long been rejected by this court, as evidenced by the following quote taken from a case alleging fraud against a lawyer:

> When one falsely states that to be true which he does not know to be true, for the purpose of inducing another to rely upon it and act upon it, he is just as guilty of actionable fraud in the event he is accepted at his word as if he knew at the time it was not true. One cannot falsely state a fact to be true as of his own knowledge, about which he has no knowledge, for the purpose of inducing another to act, and then, when action follows, escape liability on the mere showing that he did not know the fact to be untrue at the time he made the statement.

*Hall*, 261 Iowa at 769, 156 N.W.2d at 668 (quoting *Dimond v. Peace River Land & Dev. Co.*, 182 Iowa 400, 408, 165 N.W. 1032, 1035 (1918)).

It is also well settled that intent to deceive may be proven in one of two ways: by proof that the speaker (1) has actual knowledge of the falsity of the representation

or (2) speaks in reckless disregard of whether those representations are true or false. *Garren*, 481 N.W.2d at 338; *Beeck v. Aqua Slide 'N' Dive Corp.*, 350 N.W.2d 149, 155 (Iowa 1984). Given Rosen's tacit admission that he tendered a false affidavit to the board, we believe the record would support a finding by a reasonable fact finder under either prong of the intent to deceive element.

2. *Materiality*. Rosen has a somewhat stronger case on the question of materiality. Licensure in Iowa requires only an accredited one-year internship or residency. 653 Iowa Admin. Code 11.3(1)(d). Rosen easily meets this requirement based on the internship and residency he completed before starting the preceptorship. Thus, he argues, any misrepresentation on the form concerning his preceptorship is immaterial and may not be used to disqualify him.

We believe Rosen's argument begs the larger question of whether an applicant's honesty, integrity, and judgment – as demonstrated in the licensure process or anywhere else – are material to decisions made by a licensing board. We have no reason to question the board's judgment that they are. Moreover, we are unwilling to hold, as a matter of law, that the board must regard Rosen's admitted dishonesty as immaterial just because the facts to which he swore were not, standing alone, material to the question of licensure.

This case is not unlike *Weber v. Colorado State Board of Nursing*, 830 P.2d 1128 (Colo. App. 1992). There the court upheld a finding of fraud or misrepresentation in procuring a license against a nurse who failed to disclose on her application the entry of guilty pleas to two felonies. *Id.* at

1131. The guilty pleas were ultimately withdrawn based on a deferred judgment and could not be used to disqualify her for licensure. *Id.* at 1133. But because they had not been withdrawn *at the time she filled out her application*, the court held she had failed in her duty of disclosure thereby violating the prohibition against fraud or misrepresentation in procuring a license. *Id.* at 1131.

Here, among the items left blank on Rosen's application, was a question pertaining to allegations of medical malpractice. Rosen admitted under oath that a pending suit should have been disclosed. We reject Rosen's claim that this omission, as well as his false attestation, are not material matters from which a reasonable person could infer a deliberate perversion of the truth.

3. *Scienter.* Rosen admits that he was careless in permitting Knapp to complete and submit his application, but claims the record is without proof that he *knowingly* made any false statement. *See B & B Asphalt Co. v. T.S. McShane Co.*, 242 N.W.2d 279, 284 (Iowa 1976) (element of scienter requires proof of false representation made knowingly). Again he attempts to shift the blame to Knapp for knowingly making the misstatements. He thereby sidesteps his own knowing act of signing the application in blank, contrary to the plain message of the attestation.

As with proof of intent to deceive, scienter may be established by proof of actual knowledge of the falsity, or proof of reckless disregard for whether a representation is true or false. *Garren*, 481 N.W.2d at 338. We are unwilling to find, as a matter of law, that this record could not support a finding that Rosen's actions were more than

careless and amounted to a knowing indifference for the consequences of his conduct. *See Board of Dental Examiners v. Hufford*, 461 N.W.2d 194, 201 (Iowa 1990).

In summary, we believe that no matter how Rosen tries to minimize the effect of his dishonesty, or cast the blame elsewhere, this record contains substantial evidence that he intentionally submitted an application for licensure that knowingly misrepresented material facts bearing on his qualification to practice medicine in this state. How the board weighed the evidence necessarily entails judgment calls that are uniquely within the realm of the board as fact finder. *Burns*, 495 N.W.2d at 699. On issues so fundamental to the medical licensing process as the honesty and integrity of the applicant, we are unwilling to substitute our judgment for that announced by the board. The decision of the board, upheld on judicial review, must be affirmed.

IV. Upon receiving the board's decision, Rosen applied for rehearing. His application alleged, on information and belief, that there are numerous cases in which the board has not treated every answer on an application for licensure as material. Rosen then alleged disparate treatment, in violation of the equal protection clauses of the state and federal Constitutions, and sought discovery of board records to substantiate his allegations. The board denied the application without substantive comment.[3] On judicial review, the district court found Rosen failed to preserve error on his constitutional claim. It concluded,

---

[3] The ruling did contain the following notation handwritten by the board chairperson: "Dr. Rosen may submit a new, completed application for consideration."

therefore, that the board had not abused its discretion in denying rehearing.

Rosen correctly asserts on appeal that, in order to preserve agency error for judicial review, a constitutional issue may be raised for the first time in a petition for rehearing. *Fisher v. Board of Optometry Examiners*, 478 N.W.2d 609, 612 (Iowa 1991). The district court was incorrect in ruling otherwise. Its error, however, does not entitle Rosen to rehearing.

To prevail on an equal protection claim, Rosen would be required to prove (1) that he is similarly situated with persons who have been treated differently by the board, and (2) that the board has no rational basis for the dissimilar treatment. *More v. Farrier*, 984 F.2d 269, 271 (8th Cir. 1993). Rosen has not made even a minimal showing in support of either test. He merely asserts on appeal that the facts he alleges "are highly plausible as a matter of simple common sense." Given the necessarily individualized review of applicants for medical licensure, and the substantial evidence in the record bearing on Rosen's character, we find no abuse of discretion in the board's denial of rehearing and affirm the court's judgment on this issue.

V. Finally, Rosen claims the court should have granted his motion for leave to present additional evidence responsive to an argument made in the State's trial brief. The court did not rule on the motion, and Rosen did not move to enlarge the ruling pursuant to Iowa Rule of Civil Procedure 179(b). The issue, therefore, has not been preserved for appellate review. *West Branch State*

*Bank v. Gates*, 477 N.W.2d 848, 852 (Iowa 1991); *Kernodle v. Commissioner of Ins.*, 331 N.W.2d 132, 134 (Iowa 1983).

**AFFIRMED.**

All justice concur except Ternus, J., who dissents.

**EXHIBIT B**

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

| | |
|---|---|
| ROBERT MARK ROSEN, D.O. (152-56-4061), Petitioner, vs. BOARD OF MEDICAL EXAMINERS (99AG27217), Respondent. | AA NO. 2236 RULING ON PETITION FOR JUDICIAL REVIEW |

Hearing was held on Robert Rosen's Petition for Judicial Review on January 28, 1994. Petitioner Rosen was represented by his attorney, Craig F. Graziano. Respondent Board of Medical Examiners was represented by its attorney, Maureen McGuire. After hearing the arguments of counsel, reviewing the court file and briefs, and being fully advised in the premises, the Court now enters the following ruling.

## STATEMENT OF THE FACTS/CASE

On July 23, 1991, Respondent Iowa Board of Medical Examiners [hereinafter "Board"] received an application for a permanent medical license from Petitioner Robert Mark Rosen. On section eleven of the application, Rosen indicated that he had served a preceptorship under D.P. Knapp, M.D., at Moline Dermatology from July 1988 to June 1991. On the last page of the application was an

Affidavit of Applicant wherein was located the following statement:

> I, Robert Rosen, being duly sworn state, under penalty of perjury, that the foregoing information contained in this application and any attachment is true and correct, and the attached photo is a true likeness of myself.

Rosen's signature is under this statement.

After an investigation, the Board learned that Moline Dermatology was purchased from Knapp by Adam Mohit, M.D., in April of 1989, that Knapp had continued to work at Moline Dermatology on an intermittent basis thereafter, and that Knapp ceased to be associated with Moline Dermatology after June of 1990. Rosen's statement that he had served a preceptorship under Knapp from July 1988 to June 1991, therefore, was false. Rosen's statement that the information on the application was true and correct was also false.

On April 20, 1992, the Board notified Rosen that his application had been denied for "failing to make full, complete and accurate disclosures" in section eleven.

On or about May 7, 1992, Rosen appealed the Board's decision. On or about September 21, 1992, Rosen requested a more definite statement of the reason for denial. In response to this request, the Board indicated to Rosen that it had determined that his statement regarding the preceptorship under Knapp was false because Knapp ceased to be associated with Moline Dermatology after June of 1990. The Board concluded that by this false statement Rosen had failed to make full, complete and

accurate disclosures and that this constituted "fraud in procuring a license."

A hearing on Rosen's appeal was held April 29, 1993. At this hearing Rosen stated that he had signed a blank application form and had relied upon Knapp to fill in the pertinent information. Rosen stated that he felt Knapp knew him well enough to fill in the information accurately and that because Knapp wanted Rosen to work for him, Knapp would do nothing to jeopardize Rosen's chance to obtain a license from the Board. Rosen knew of no reason why Iowa would deny him a medical license because Rosen met all the requirements and was even board certified. Rosen believed he was guilty of bad judgment when he signed the blank application but not of making false statements.

Near the end of the hearing, the Board's attorney moved to amend the more definite statement to include Rosen's signing of a blank application form. This motion was resisted by Rosen on the basis of timeliness. The Administrative Law Judge polled the members of the Board and then ruled that she would allow the amendment with the proviso that the Board could overrule that ruling.

On or about June 3, 1993, the Board denied Rosen's appeal.

Rosen filed an Application for Rehearing on June 23, 1993. In this application, Rosen raised the issue of equal protection by alleging that he had been treated differently than other applicants because all the information on his application had been deemed "material," whereas this

was not the treatment accorded to all applicants for a medical license.

On July 1, 1993, the Application for Rehearing was denied.

On July 29, 1993, Rosen filed the Petition for Judicial Review before this Court.

## STANDARD OF REVIEW

Judicial review of the action of an administrative agency is governed by the standards of Iowa Code section 17A.19(8). *Mercy Health Center v. State Health Facilities Council,* 360 N.W.2d 808, 811 (Iowa 1985). The court acts in an appellate capacity by reviewing the agency's decision solely to correct any errors of law. *Dubuque Community Sch. Dist. v. Public Employment Relations Bd.,* 424 N.W.2d 427, 430 (Iowa 1988). Nearly all disputes in the scope of administrative law are won or lost at the agency level. *Iowa-Illinois Gas & Elect. Co. v. Iowa State Commerce Comm'n,* 412 N.W.2d 600, 604 (Iowa 1987).

The cardinal rule of administrative law is that judgment calls are the province of the administrative tribunal and not of the courts. *Mercy,* 360 N.W.2d at 809. The agency's decision is final if it is supported by substantial evidence and is correct in its conclusions of law. *Heatherly v. Iowa Dept. of Job Services,* 397 N.W.2d 670, 670 (Iowa 1987). The agency's decision is supported by substantial evidence in the record when a reasonable mind would accept the record viewed as a whole as adequate to reach the conclusion. *See Alcoa v. Employment Appeal Bd.,* 449 N.W.2d 391, 394 (Iowa 1989).

The possibility of drawing two inconsistent conclusions from the same evidence does not prevent the agency's decision from being supported by substantial evidence. *Henry v. Iowa Dept. of Job Services*, 391 N.W.2d 731, 734 (Iowa Ct. App. 1986). The court must not reassess the weight to be accorded to evidence; assessing the weight is within the exclusive domain of the agency. *Burns v. Board of Nursing*, 495 N.W.2d 698, 699 (Iowa 1993).

A court may reverse an agency action that is affected by error of law. Iowa Code sec. 17A.19(8)(e) (1993). When deciding whether an agency made an error of law, the court gives weight to the agency's construction of a statute, but is not bound by this construction. *Super Valu Stores v. Department of Revenue*, 479 N.W.2d 255, 258 (Iowa 1991). It is ultimately the duty of the court to determine matters of law, including the interpretation of a statute or an agency rule interpreting a statute. *Hollinrake v. Law Enforcement Academy*, 452 N.W.2d 598, 601 (Iowa 1990).

## CONCLUSIONS OF LAW

Rosen questions three actions by the agency: 1) the denial of a permanent medical license, 2) the amendment of the More Definitive Statement to include the fact Rosen signed a blank application, and 3) the denial of the Application for Rehearing. Rosen argues the first action is contrary to law and is unsupported by substantial evidence. Rosen believes the last two actions are contrary to law.

**WHETHER THE DENIAL OF A MEDICAL LICENSE WAS CONTRARY TO LAW OR UNSUPPORTED BY SUBSTANTIAL EVIDENCE WHEN THE RECORD IS VIEWED AS A WHOLE**

Rosen's application for a medical license was denied on the basis that he had committed fraud in procuring a license. (R. 14-15; More Definitive Statement.)

Rosen argues the board failed to prove all of the elements of fraud. (R. 15-22, 23-25). It is not entirely clear to this Court how Rosen believes the agency action was contrary to law. Presumably, Rosen believes that, as a matter of law, some or all of the elements of fraud were not proven. Rosen's substantial evidence argument is that the record lacks substantial evidence to support a finding of fraud.

The Board argues that its action in denying Rosen a license is supported by substantial evidence in the record. (Resp.'s Br. at 3-9.)

**WHETHER THE DENIAL OF A MEDICAL LICENSE WAS CONTRARY TO LAW**

Rosen's argument that the agency's action is contrary to law raises the issue of what constitutes "fraud in procuring a license." Specifically, Rosen's argument raises the question of whether "fraud in procuring a license" is equivalent to actual fraud.

Section 147.4 of the Iowa Code provides that a license may be refused to persons otherwise qualified for a license on any of the grounds for which a license may be revoked or suspended. Section 147.55 of the Iowa Code

lists the grounds for revoking a license. "Fraud in procuring a license" is one of those grounds. Section 272C.10 of the Iowa Code provides that a licensing board "shall by rule include provisions for the revocation or suspension of a license which shall include but is not limited to" eight listed grounds. "Fraud in procuring a license" is one of those grounds. None of these statutory provisions provides a further definition of "fraud in procuring a license."

The Board has promulgated a rule which defines "fraud in procuring a license." That rule states:

> Fraud in procuring a license includes, but is not limited to *an intentional perversion of the truth* in making application for a license to practice medicine and surgery, osteopathic medicine and surgery or osteopathy in this state, *and includes false representations of a material fact, whether by word or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed* when making application for a license in this state, or attempting to file or filing with the board or the Iowa department of public health any false or forged diploma, or certificate or affidavit or identification or qualification in making an application for a license in this state.

653 I.A.C. 12.4(1) (emphasis added). This definition is somewhat hard to follow, but the [italicized] portions of the definition highlight the elements of "fraud in procuring a license" which were relied upon by the Board in this case.

Fraud is a generic term which can be used in a variety of contexts. *See* 37 Am. Jur. 2d *Fraud and Deceit*

sec. 1 (1968). One of the broadest classifications of fraud is that it is actual or constructive. *Id.* sec. 4. "Actual fraud consists in deception intentionally and successfully practiced to induce another to part with property or to surrender some legal right." 37 C.J.S. *Fraud* sec. 2 (1943). "Constructive fraud is a breach of duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive, to violate confidence, or to injure public interests." *Id.* An important difference between actual and constructive fraud is that constructive fraud does not require actual dishonesty or intent to deceive. 37 Am. Jur. 2d *Fraud and Deceit* sec. 4 (1968). An examination of the definition of "fraud in procuring a license" indicates that it is more similar to constructive rather than actual fraud.

The elements of fraud cited by Rosen in his Brief, (Pet.'s Br. at 14), however, are those of actual fraud. It would seem, therefore, that Rosen is presuming that "fraud in procuring a license" is equivalent to actual fraud. Rosen cites no basis for this presumption.

The Board's definition of "fraud in procuring a license" is highly similar to the definition of fraud found in the Fifth Edition of Black's Law Dictionary (Black's) at page 594. In fact, the phrases [italicized] in the definition of "fraud in procuring a license" provided earlier in this Ruling are found in the first paragraph of the definition of fraud in Black's. Within the same paragraph, it is noted that fraud is a generic term and includes "all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated." The definition in Black's describes

the elements and classifications of fraud in further paragraphs. Although not dispositive, the fact that the definition of "fraud in procuring a license" was taken from a paragraph defining fraud in its more generic sense also indicates that "fraud in procuring a license" is not equivalent to actual fraud.

Although there are no reported Iowa cases interpreting "fraud in procuring a license," there is a recent case interpreting "habitual intoxication," one of the other grounds for revocation of a license found in section 147.55 of the Iowa Code and defined at 653 I.A.C. 12.4. In *Burns v. Board of Nursing*, the Supreme Court of Iowa approved the definition of habitual intoxication found at 653 I.A.C. 12.4 and rejected the district court's conclusion that the definition of habitual intoxication should be consistent with the definition found in Black's Law Dictionary. 495 N.W.2d 698, 700-01 (Iowa 1993). The court reasoned that the Board of Nursing could require a lesser showing of habitual intoxication than that required by the definition supplied by the district court because of the public policy considerations involved. *See id.* The court also stated that the Board of Nursing, acting within the parameters of due process, must be allowed to apply the definition of habitual intoxication on a case-by-case basis in light of public health and safety concerns. *Id.* at 701.

By analogy, the definition of "fraud in procuring a license" can require a lesser showing than that required to prove actual fraud. Also, the Board must be allowed to apply its definition of "fraud in procuring a license" on a case-by-case basis. Furthermore, the public safety and health concerns cited in *Burns* are equally applicable to the licensure of medical personnel in this state and are

amply demonstrated in the case before the Court. An applicant's reason or motive in signing a blank application are irrelevant to whether the signing of the blank application results in harm to an individual or to the public at large.

The Court concludes that "fraud in procuring a license" is not, nor is it required to be, equivalent to actual fraud. Consequently, the Board's decision to deny Rosen a license is not contrary to law.

## WHETHER THE DENIAL OF A MEDICAL LICENSE IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE WHEN THE RECORD IS VIEWED AS A WHOLE

The record shows that the Board denied a medical license to Rosen because the information provided as to the preceptorship under Knapp was false. Therefore, Rosen's affidavit stating that the information supplied on the application form was true and correct was also false. This is sufficient evidence to conclude Rosen's application contained a false representation of a material fact which, by definition, constitutes "fraud in procuring a license."

Rosen argues that the information regarding the preceptorship was not a material fact. (Pet.'s Br. at 16.) That is a judgment call to be made by the agency. In addition, Rosen's argument ignores the fact that his affidavit stating that the information on the application was true and correct was a false affidavit. That is also a material fact.

It is also true the affidavit provides an independent basis for finding substantial evidence to support the denial of the medical license. The definition of "fraud in

procuring a license" includes "filing with the board . . . any false . . . affidavit . . . in making application for a license in this state." 653 I.A.C. 12.4(1). Rosen's false affidavit regarding the truth of the information on the application fulfills this aspect of the definition of "fraud in procuring a license."

The Court finds the agency action of denying Rosen a medical license is supported by substantial evidence when the record is viewed as a whole.

**WHETHER THE AGENCY ACTION GRANTING THE MOTION TO AMEND THE MORE DEFINITIVE STATEMENT WAS CONTRARY TO LAW**

In his argument that the amendment of the More Definitive Statement to reflect the fact that Rosen signed a blank application form was an action contrary to law, Rosen cites Iowa Rule of Civil Procedure 106, which allows amendment of pleadings to reflect issues that are tried by express or implied consent of the parties. (Pet.'s Br. at 26.) The rest of Rosen's argument on this issue, however, focuses upon whether the pleadings provided him with notice of the issues to be heard before the Board. (*See id.* at 27-30.) This argument implicates Iowa Rule of Civil Procedure 69.

Iowa's Rules of Civil Procedure do not apply to contested cases before administrative agencies. *See* Iowa R.Civ.Pro. 1 (providing the rules govern procedure in "courts of the state"). The procedure to be followed in a contested hearing is set forth in sections 17A.12 and 17A.13 of the Iowa Code. Specifically, section 17A.12(2)(d) provides that the notice of a contested hearing must include a short and plain statement of the

matters asserted. After notice is served, a more definite and detailed statement may be furnished upon application. *Id.*

The purpose of the notice requirements of section 17A.12 is to alert the parties to the issues which will be heard during the contested case. *See Freeland v. Employment Appeal Bd.*, 492 N.W.2d 193, 195-96 (Iowa 1992) (holding that notice which included the statutory provisions at issue but not the factual basis for each provision adequately advised the parties as to the issues to be adjudicated). In the present case, Rosen knew that the issue to be heard before the Board was whether he had committed "fraud in procuring a license." The amendment of the More Definitive Statement did not change the issue before the Board in anyway. The amendment merely reflected an addition to the factual basis for the charge of "fraud in procuring a license." Furthermore, Rosen can hardly complain that he was not aware of the fact which was added to the More Definitive Statement when he is the one that volunteered the information during the hearing that he had signed a blank application form.

The Court concludes that the amendment of the More Definitive Statement was not contrary to law.

**WHETHER THE DENIAL OF ROSEN'S APPLICATION FOR A REHEARING IS CONTRARY TO LAW**

Rosen points to the Board's statement in its decision that "[a]ll of the questions on the application are material in that the answer to each question is considered by the Board in making its licensing decision." (Pet.'s Br. at 31.) Rosen argues this statement indicates he was not given

equal treatment because all of his answers on the application form were treated as "material," whereas he believes this is not the treatment given to the answers of other applicants. (*Id.* at 31-32.) Rosen believes the denial of his Application for Rehearing, which raised this issue, is contrary to law because he "is entitled to relief" and the Board should give him the opportunity to prove the allegation of his Application for Rehearing. (*Id.* at 32.)

Section 17A.16(2) of the Iowa Code states that any party may make an application for a rehearing. This application is deemed denied, however, if it is not granted within twenty days. The granting of a rehearing, therefore, is within the discretion of the agency.

The rule promulgated by the Board which interprets section 17A.16(2) states that upon a rehearing the Board shall consider facts not presented in the original proceeding. 653 I.A.C. 12.50(30). These facts are to be considered if there is some reason they could not have been considered at the original hearing. *Id.* The rule thereby indicates the purpose of a rehearing is to hear further facts related to the original proceeding. The purpose is not to hear issues which were not raised at the original proceeding.

Rosen is attempting to raise an issue which was not before the agency at the original proceeding. It, therefore, was not an abuse of discretion for the agency to deny his application for a rehearing. That action by the agency was not contrary to law.

**RULING**

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the agency action is AFFIRMED.

Dated this 25th day of March, 1994.

/s/ GENE L. NEEDLES, JUDGE
FIFTH JUDICIAL
DISTRICT OF IOWA

**EXHIBIT C**

BEFORE THE BOARD OF MEDICAL EXAMINERS
OF THE STATE OF IOWA

| | | |
|---|---|---|
| IN THE MATTER OF THE APPLICATION FOR LICENSURE OF: | ) | NO. 03-92-095 |
| | ) | DIA NO. 92DPHMB-28 |
| | ) | |
| | ) | FINDINGS OF FACT, |
| ROBERT MARK ROSEN, D.O., | ) | CONCLUSIONS OF |
| | ) | LAW, DECISION |
| Applicant | ) | AND ORDER |
| | ) | |

TO: Robert Mark Rosen, D.O.

On April 20, 1992, the Iowa Board of Medical Examiners notified Robert Mark Rosen, D.O., (Applicant) that they had voted to deny his application for permanent Iowa medical licensure. On May 13, 1992, the Applicant filed a Notice of Appeal. On September 24, 1992, the Applicant filed a Request for a More Definite Statement. A Response to Request for More Definite Statement was filed on October 1, 1992. The hearing was continued.

A hearing was held before the full Board on April 29, 1993, at 1:00 p.m. in the first floor conference room, Wallace State Office Building, Des Moines, Iowa. The following members of the Board were present: C. L. Peterson, D.O.; John Olds, M.D.; James Caterine, M.D.; Charlotte Cleavenger, D.O.; George Spellman, M.D.; Johanna Whalen, M.D.; Edra Broich and Mary Hodges,

public members. The Applicant appeared and was represented by his counsel, Craig Graziano and Miriam Sawtelle. The State was represented by Maureen McGuire, Assistant Attorney General. Margaret LaMarche, Administrative Law Judge from the Iowa Department of Inspections and Appeals, presided. The hearing was recorded by a certified court reporter. After hearing the testimony and examining the exhibits, the Board convened in closed executive session, pursuant to Iowa Code section 21.5(1)(f) to deliberate. The Board instructed the Administrative Law Judge to prepare its decision. On May 3, 1993, the Applicant filed a Resistance to State's Motion and Supplemental Memorandum on the Law of Fraud.

## THE RECORD

The record includes the Notice of Denial, Notice of Appeal, Request for More Definite Statement, Request for Continuance, Order for Continuance, Response to Request for More Definite Statement, Second Order for Continuance, Notice of Hearing, Order Rescheduling Hearing, the testimony of the witnesses, Respondent's Memorandum on the Law of Fraud, and the following exhibits:

| | |
|---|---|
| Exhibit 1: | Application for Medical Licensure |
| Exhibit 2: | Letter September 4, 1991 (Ireland to Yaroff) |
| Exhibit 3: | Certificate of Completion of Internship |
| Exhibit 4: | Letter September 13, 1991 (Friedman to Vanderpool) |

| | |
|---|---|
| Exhibit 5: | Certification of Residency (July 1, 1987 to June 30, 1988) |
| Exhibit 6: | Affidavit of Miriam Sawtelle |
| Exhibit 7: | Advertisement, November 1987 |
| Exhibit 8: | Letter March 31, 1989 (Ward to Applicant) |
| Exhibit 9: | Letter January 31, 1990 (Ward to Applicant) |
| Exhibit 10: | Letter June 6, 1991 (Ward to Applicant) |
| Exhibit 11: | Affidavit of James D. Bernard, D.O. |
| Exhibit 12: | Letter June 6, 1991 (Ward to Applicant) |
| Exhibit 13: | Letter January 26, 1993 (Ward to Applicant) |
| Exhibit 14: | Affidavit of David Paul Knapp, M.D. |
| Exhibit 15: | Affidavit of Leslie Kramer, D.O. |
| Exhibit 16: | Letter April 20, 1992 (Vanderpool to Applicant) |
| Exhibit 17: | Notice of Appeal |
| Exhibit 18: | Response to Request for More Definitive Statement |
| Exhibit 19: | Curriculum Vitae of Applicant |

## FINDINGS OF FACT

1. On July 23, 1991, the Board received an application for permanent medical licensure in Iowa for the Applicant. Under section 11, entitled "Residencies," the Applicant stated that he served a preceptorship under D.P. Knapp, M.D., at Moline Dermatology from July 1988 until June 1991. (Joint Exhibit l; testimony of Doug Brown)

2. During the course of another investigation, a Board investigator questioned the current owner of Moline Dermatology, Dr. Adam Mohit, M.D., about the Applicant's preceptorship. Dr. Mohit stated that he had purchased the clinic from Dr. Knapp in April 1989, and Dr. Knapp worked at the clinic only about three months after April 1989, and then went on extended leave. Dr. Knapp permanently left the clinic in June 1990. (testimony of Doug Brown, Dr. Adam Mohit, M.D.)

3. The Board voted to deny the Applicant's application based upon his false statement in his application that he served a preceptorship under Dr. Knapp until June 1991. The Applicant appealed and filed a Request for a More Definite Statement. In its Response, the Board stated that Dr. Knapp did not work in the clinic after June 1990, and therefore Applicant failed to make full, complete and accurate disclosures in his application. (Exhibits 16, 17, 18)

4. The Applicant admits that he did not serve a preceptorship under Dr. Knapp from June 1990 until June 1991. In 1987, Applicant applied for a three-year preceptorship through an advertisement in a medical journal. He began the preceptorship, under Dr. Knapp, in August 1988. The Applicant sought approval for the preceptorship through

the American Osteopathic Association (AOA). On March 31, 1989, Applicant was notified that he had received program approval, but he was also required to file an annual report and scientific paper following each year of preceptorship. Each year of preceptorship needed to be separately approved by the Board of Trustees of the AOA. (testimony of Applicant; Exhibits 7, 8)

5. The Applicant's first two years of his preceptorship, from August 1, 1988 to June 30, 1990, were so approved. The Applicant continued to work at Moline Dermatology from June 30, 1990 to June 30, 1991. However, Dr. Knapp had left and Dr. Mohit had not sought approval as a preceptor. Dr. Knapp suggested that the Applicant file for approval of his third year as an "elective year," but the Applicant sought the advice of James D. Bernard, D.O., secretary-treasurer of the American Osteopathic College of Dermatology. Dr. Bernard encouraged the Applicant to seek a different preceptor for his third year. The Applicant did not file for approval of his third year at Moline Dermatology. (testimony of Applicant; Exhibits 9, 10, 11)

6. The Applicant found another preceptor, Dr. Stewart Chalamidas, M.D. of Santa Ana, California, and served a preceptorship under him from August 1, 1991 to July 30, 1992. He sought and received approval for this preceptorship from the AOA. (testimony of Applicant; Exhibits 12, 13)

7. The Applicant testified that the reason the answer to section 11 on his application for licensure is inaccurate is because he did not fill out the application. The Applicant signed the application, in blank, and allowed Dr. Knapp to fill out the application for him. Dr. Knapp had the

Applicant's curriculum vitae to assist him. The Applicant stated that he signed the application in blank because Dr. Knapp had been pressuring him to accept a position with him for which he needed Iowa licensure. The Applicant had procrastinated applying for an Iowa license, and Dr. Knapp was getting impatient. At first the Applicant resisted signing the application, but eventually he agreed. The Applicant testified that he signed the application, in blank, in April 1991 and did not see it before it was filed. (testimony of Applicant).

8. The signature section on the application for permanent medical licensure in Iowa is in the form of an affidavit. It states, "I, ____, being duly sworn state, under penalty of perjury, that the foregoing information contained in this application and any attachment is true and correct, and the attached photo is a true likeness of myself." Below the signature line is a form for a notary's signature. The appellant's signature was notarized on May 28, 1991. The appellant does not know how Dr. Knapp obtained the notarization. (testimony of Applicant; Exhibit 1)

9. Dr. Knapp submitted an affidavit in which he admits filling out the applicant's application, using his curriculum vitae. Dr. Knapp stated that when he filled out the application he thought that the Applicant's third year had been treated as an "elective" year by the AOA. (Exhibit 14)

10. The application for permanent medical licensure contains numerous questions, such as "Are you now or have you ever been addicted to, abused, or excessively used alcohol, barbiturates, narcotics, habit-forming

drugs?" which Dr. Knapp could not possibly answer for the applicant using his curriculum vitae. (Exhibit 1)

## CONCLUSIONS OF LAW

1. Pursuant to Iowa Code section 147.4 (1991), the department may refuse to grant a license to practice a profession to any person otherwise qualified upon any of the grounds for which a license may be revoked or suspended.

2. Iowa Code section 258A.10 (1991) provides in relevant part:

> A licensing board established after January 1, 1978 and pursuant to the provisions of this chapter shall by rule include provisions for the revocation or suspension of a license which shall include but is not limited to the following:
>
> 1. Fraud in procuring a license.
>
> . . .

3. 653 IAC 12.4(1) provides:

> **Grounds for discipline.** The board may impose any of the disciplinary sanctions set forth in rule 12.2(258A), including civil penalties in an amount not to exceed $10,000, when the board determines that the licensee is guilty of any of the following acts or offenses:
>
> Fraud in procuring a license. Fraud in procuring a license includes, but is not limited to an intentional perversion of the truth in making application for a license to practice medicine and surgery, osteopathic medicine and surgery or osteopathy in this state, and includes false

> representations of a material fact, whether by word or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed when making application for a license in this state, or attempting to file or filing with the board or the Iowa department of public health any false or forged diploma, or certificate or affidavit or identification or qualification in making an application for a license in this state.

4. The state's motion, following the testimony, to amend the grounds for denial to include the signing of the application in blank, was granted by the board. The Applicant was not prejudiced by this amendment because the signing of the application in blank was raised by the Applicant as a defense. The state could have made its motion prior to the hearing, but the timing of the amendment did not prejudice the applicant. The applicant was prepared to address the issue because he was the one who raised it. Moreover, if the motion had been denied, the Board could have filed a Complaint and Statement of Charges based upon the Applicant's signing the application in blank. This would have required a second hearing involving virtually the same facts.

5. The Applicant contends that he had no intent to deceive the Board by his answers in section 11 because he did not personally provide the answer. Applicant concedes that the answer is inaccurate.

The Applicant defends by saying that he signed the application in blank and had no knowledge of the actual contents of the application. This defense begs the larger

question. How can the Board reasonably grant an Application for licensure when the Applicant admits he did not fill out the application and did not review the answers to the application before signing it and attesting that the information given is true and correct?

653 IAC 11.1(1) provides that each applicant for a license to practice osteopathic medicine and surgery shall "submit a completed application on a form prescribed by the board . . . " The applicant failed to fulfill this most basic prerequisite for licensure. Moreover, he intentionally signed an application, attesting to its truth, when it did not yet contain any information. This is not just a case of having someone else fill out the application. In this case, the applicant never reviewed the answers given for their truthfulness, but signed the application as if he had. This was an intentional perversion of the truth and a false representation of material fact.

The applicant also argues that the answers to section 11 were not material, because proof of a residency is not required for Iowa medical licensure. All of the questions on the application are material in that the answer to each question is considered by the Board in making its licensing decision.

Moreover, honesty is a significant consideration and is material to the decision to grant medical licensure. This application was submitted as though the applicant had attested to the truth of its contents, when in fact he had no actual knowledge of its contents. As a result, it contained false information.

The applicant has violated Iowa Code section 258A.10 (1991), as defined by 653 IAC 12.4(1), when he intentionally perverted the truth in making his application for medical licensure in Iowa, by signing the attestation on the application form when the form was blank, and he failed to subsequently review the answers on the form for their truthfulness. As a result, the application contained false information.

## DECISION AND ORDER

It is hereby ORDERED that the Applicant's application for permanent medical licensure in Iowa is DENIED.

Dated this 3rd day of June, 1993.

/s/ Laura Stensrud, Secretary
Iowa Board of Medical Examiners

**EXHIBIT D**

**IN THE SUPREME COURT OF IOWA**

No. 94-691

CORRECTION NOTICE

**ROBERT MARK ROSEN,**

Appellant,

vs.

**BOARD OF MEDICAL EXAMINERS OF THE STATE OF IOWA,**

Appellee.

---

With the approval of the court, the author hereby amends the opinion filed October 25, 1995, by deleting the word "admitted" from the second line of page ten.

A corrected page ten is attached herewith.

The petition for rehearing is considered with respect to the opinion as now revised and is denied.

Dated this 17th day of November, 1995.

THE SUPREME COURT
OF IOWA

By /s/ Arthur A. McGiverin,
Chief Justice

Note: Attached to this correction notice was a substitute slip opinion page 10 with a corrected sentence as follows: "Moreover, we are unwilling to hold, as a matter of law, that the board must regard Rosen's dishonesty as immaterial just because the facts to which he swore were not, standing alone, material to the question of licensure". The uncorrected sentence appears *supra* App. 11.

---

**EXHIBIT E**

| | | |
|---|---|---|
| IN THE MATTER OF THE APPLICATION FOR LICENSURE OF ROBERT M. ROSEN, D.O., RESPONDENT | * * * * * | RULING ON RESPONDENTS APPLICATION FOR REHEARING 03-92-095 |

**BE IT REMEMBERED:**

1. That pursuant to a hearing held April 29, 1993, on June 3, 1993 the Iowa State Board of Medical Examiners (hereafter the Board) issued an order in the above entitled action denying the permanent Iowa medical license application of Robert M. Rosen, D.O. (hereafter the Respondent).

2. That on June 23, 1993, the Respondent filed an application for rehearing of the action.

3. That on June 29, 1993 the State of Iowa filed a reply and resistance to the Respondent's application for rehearing.

4. That on July 1, 1993 the Board considered the Respondent's application for rehearing and the State's reply and resistance thereto.

**THE BOARD HEREBY ORDERS** that the Respondent's application for rehearing is denied. Dr. Rosen may submit a new, completed application for consideration.

IOWA STATE BOARD OF MEDICAL EXAMINERS

/s/ Charlotte A. Cleavenger, D.O., Chair

7/1/93
DATE

**EXHIBIT F**

IN THE SUPREME COURT OF IOWA

No. 94-691

ROBERT MARK ROSEN, D.O.,

Petitioner-Appellant,

vs.

BOARD OF MEDICAL EXAMINERS OF THE STATE OF IOWA,

Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY THE HONORABLE GENE L. NEEDLES, PRESIDING

**APPELLANT'S BRIEF AND REQUEST FOR ORAL ARGUMENT**

Filed August 25, 1994.

* * * *

## II. THE STATE'S MOTION TO AMEND SHOULD HAVE BEEN DENIED AS UNTIMELY.

* * * *

In its decision, the Board granted the motion on a reasoning that "[t]he applicant was prepared to address *the issue*", and therefore was not prejudiced by the timing of the motion, "because he was the one who raised [*the*

*issue*]". Appendix at 9-10 (emphasis added). The issue raised by the motion was whether signing the application in blank equated to fraud in procuring a license. Rosen did *not* raise that issue.

The issue that Rosen raised, among others, was whether the allegedly fraudulent statement referenced in the original charge was knowingly and intentionally false. The fact that Rosen signed the application in blank, with other facts, countered the original charge by demonstrating that the allegedly fraudulent statement in the application concerning the Knapp preceptorship was made on Rosen's behalf by Knapp, was thought by Knapp to be true, and thus was not knowingly and intentionally false. See opening statement of counsel, Transcript at 12.

Rule 106, Iowa Rules of Civil Procedure,[15] permits pleadings to be amended to conform to the evidence, but only if the issues sought to be raised by amendment have been "tried by express or implied consent of the parties". This rule is identical to rule 15(b), Federal Rules of Civil Procedure. These rules have been applied on numerous occasions to deny amendment in circumstances similar to the circumstances here; they have been cited on numerous occasions for the proposition that an unpled

---

[15] Although the rules of civil procedure do not apply to contested cases before an administrative agency, Appendix at 43 (district court ruling at 11), the parties before the agency are still entitled to the same fairness before the agency as before a court of law. *Rodine v. Zoning Board of Adjustment*, 434 N.W.2d 124, 126 (Iowa App. 1988). Amendments before agencies should thus be allowed in accordance with, not contrary to, the principles articulated in rule 106.

issue is *not* tried by express or implied consent where, as here, the consent is alleged to have occurred by virtue of the introduction of evidence relevant to issues that were pled.[16]

---

[16] *Allison-Kelsey Ag Center v. Hildebrand*, 485 N.W.2d 841, 846 (Iowa 1992) (denying amendment after the close of evidence when the trial testimony presented no surprises); *Mora v. Savereid*, 222 N.W.2d 417, 422-23 (Iowa 1974) (same); *Trask v. Gibbs*, 200 N.W.2d 565, 568-69 (Iowa 1972) (same); *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 815 (1988) ("there is simply no evidence of any consent among the parties to litigate the new patent-law claim"; "[t]rue, the summary judgment papers focused almost entirely on the patent-law issues"; "[b]ut those issues fell squarely within the purview of the theories of recovery, defenses and counterclaims that the pleadings already encompassed"); *Dole v. Mr. W. Fireworks, Inc.*, 889 F.2d 543, 547 (5th Cir. 1989) ("[t]he evidence that Mr. W. alleges to have shown *implied* consent was also relevant to the other issues at trial and cannot be used to imply consent to try the present issue"; "[n]o good cause was shown for the distinctly belated raising of the [new] claim"); *Wesco Mfg. v. Tropical Attractions*, 833 F.2d 1484, 1487 (11th Cir. 1987) ("[t]he introduction of evidence arguably relevant to pleaded issues cannot serve to give a party fair notice that new issues are entering the case"); *Campbell v. Trustees*, 817 F.2d 499, 504 (9th Cir. 1987) ("[a]n amendment will be proper only if it is found that the parties expressly or impliedly consented for a trial of the issues not raised in the pleadings"; "it must appear that the party understood the evidence was introduced to prove the unpleaded issue"); *Pariser v. Christian Health Care Systems, Inc.*, 816 F.2d 1248, 1253 (8th Cir. 1987) ("we find nothing to indicate that Pariser intended to try a tortious-interference claim or that the defendant in any way consented to trial of such a claim"; "[w]hile Pariser did introduce some evidence that would be relevant to a tortious-interference claim, this evidence was also relevant to Pariser's other claims, so its introduction did not provide the defendant any notice that a claim for tortious interference . . . was being tried"); *Quillen v. International Playtex, Inc.*, 789 F.2d 1041, 1044 (4th Cir.

The district court cited *Freeland v. Employment Appeal Board*, 492 N.W.2d 193 (Iowa 1992), as authority for affirming the agency action allowing amendment here. Appendix at 43. The reasoning of *Freeland* supports reversal rather than affirmance. In *Freeland*, the Court held, the affected party *was* advised of the claim raised (whether her use of employer funds for private purposes was misconduct disqualifying her from unemployment benefits). She *was able to, and in fact did*, defend against the claim at the time of the hearing. 492 N.W.2d at 196. Rosen was not advised of the amended charge here. Nor was he able to, nor did he, defend against it at the time of the hearing.

Prior to receiving any evidence, the administrative law judge in *Freeland* explicitly referenced the misconduct

---

1986) ("[t]he case was simply not tried on that basis"); *Cioffe v. Morris*, 676 F.2d 539, 541-42 (11th Cir. 1982) ("implied consent . . . will not be found if the defendant will be prejudiced; that is, if the defendant had no notice of the new issue, if the defendant could have offered additional evidence in defense, or if the defendant in some other way was denied a fair opportunity to defend"); *Jimeniz v. Tuna Vessel Granada*, 652 F.2d 415, 421 (5th Cir. 1981) ("[a]ll of the evidence upon which the court relied in finding the GRANADA unseaworthy was relevant . . . to the issue made in the pleadings"; "the introduction of such evidence gave this defendant no fair notice that new issues were thereby entering the case"; "the court abused its discretion in determining that the unpled issues on which it decided against the GRANADA were tried by its implied consent"); *Cook v. City of Price*, 566 F.2d 699, 702 (10th Cir. 1977) ("it would be unjust to the opposing party to consider a new theory of recovery after trial is complete"; "[t]his rule obtains because an opponent must be given a fair chance to plan his defense to meet pleaded allegations").

issue. 492 N.W.2d at 195. *The factual basis for the alleged misconduct, moreover, did not shift:* the agency did not, in response to a request for more definite statement, cite one alleged instance of misconduct, only to announce for the first time after the close of the evidence that it wished to rely on a different alleged instance of misconduct, of which it had been made aware six weeks earlier. That is precisely what occurred here, except that the issue was fraud rather than misconduct. In the language of the statutory provision applied in *Freeland*, Freeland received "a short and plain statement of the matters asserted". 492 N.W.2d at 195, citing Iowa Code § 17A.12(2)(c) and -(d) (1993).

Rosen did not. Far from stating that the "signing in blank" charge was a part of the issues, the administrative law judge here reiterated that the scope of the issues was as stated in the Board's response to Rosen's request for more definite statement. "[T]he basis for the denial", she said, "was [the answer to] question 11 [concerning the Knapp preceptorship]", "so I think we'll have to confine our record to question 11 today". Transcript at 21.

The fact that a party is represented by counsel does not resolve the issue here, as it did in *Freeland*. 492 N.W.2d at 196. Counsel does not wisely defend charges not made. A request for more definite statement is the procedural mechanism by which counsel learns what charge needs to be defended. Counsel's first action in this case was to request a more definite statement; his stated reason for doing so was to facilitate preparation for hearing. Appendix at 3. Counsel's opening statement closely tracked the Board's response for more definite statement. Transcript at 5-15. The issue that was tried was the issue

identified in the Board's response to Rosen's request for more definite statement.

There is more to the matter than proper procedure. "Notice remains a first-reader element of procedural due process"; "each party is entitled to know what is being tried"; "trial by ambush is no more favored here than elsewhere". *Jimeniz v. Tuna Vessel Granada, supra,* 652 F.2d at 415. A respondent is entitled to know what he is on trial for. *Drug Packages, Inc. v. National Labor Relations Bd.,* 570 F.2d 1340, 1345 (8th Cir. 1978). To comport with due process, a person must ordinarily be informed somehow of the issues involved in order to prevent surprise at the hearing and allow an opportunity to prepare. *Wedergren v. Board of Directors,* 307 N.W.2d 12, 16 (Iowa 1981). The time for giving such notice is prior to the hearing. *Boyle's Famous Corned Beef Co. v. National Labor Relations Bd.,* 400 F.2d 154, 163-65 (8th Cir. 1968).

The foregoing principles were applied in the context of physician licensure in *Weiner v. Board of Regents,* 158 N.Y.S.2d 730 (A.D. 1956). The original charge against the physician in that case was based on his *prior conviction of income tax evasion*. He answered the charge by disclosing that a portion of the income attributed to him for tax purposes had been paid to other physicians who referred patients to him. The licensing body suspended his license for *fee-splitting*. As here, it was argued on behalf of the State that he was "fully aware" of the "issues" and hence that the licensing body's action should be upheld. *Id.* at 733.

The court disagreed. There was "nothing in any of the statements of the [licensing body] or the assistant

attorney general who presented the case to it", the court said, "to suggest the [licensing body] was suggesting to the petitioner it deemed it had before it two charges, not one". *Id.* at 734. On the whole record, the court continued, the "petitioner or his counsel could not have known from the course of proceedings . . . that the issue which the [licensing body] 'deemed important' was not the charge it was trying, but another charge". *Id.* at 735. If the petitioner was to be disciplined for fee-splitting, the court held, "due process of law require[d] that he be charged with it in plain words and have a clear opportunity to meet it head on", "and not as a mere facet to another charge". *Id.* at 734, 735.

The State's belated attempt to add an additional charge by amendment here was based on evidence made known to the State six weeks prior to the hearing. Had the motion to amend been timely, Rosen could have altered his preparations to meet the new charge head on. Because the additional charge was not tried with the consent of the parties, the Board abused its discretion in allowing the amendment. In addition, allowing the amendment denied Rosen due process of law.[17]

---

[17] The Board compounded its error with the following statement: "Moreover, if the motion had been denied, the Board could have filed a [second] Complaint and Statement of Charges based upon the Applicant's signing the application in blank." Appendix at 10. The doctrine of claim preclusion forbids that result. *Restatement, Second, of Judgments* § 25 and comment b (1982) ("[i]t is immaterial [and therefore does not avoid the preclusive effect of a prior judgment] that the plaintiff in the first action sought to prove acts relied on in the second action and was not permitted to do so because they were not alleged in the complaint and an application to amend the complaint came

* * * *

/s/ Craig F. Graziano
/s/ James W. O'Brien
Attorneys for
Robert Mark Rosen, D.O.

---

too late"). Iowa law accords with the *Restatement* view. *B & B Asphalt Co. v. T.S. McShane Co., supra,* 242 N.W.2d at 286-87 ("[c]laim preclusion . . . is based on the principle that a party may not split or try his claim piecemeal"; "[h]e does not get another day after the first lawsuit is concluded by giving a different reason than he gave in the first"; "[d]isallowance of the amendment did not occur on a ground of misjoinder but on unrelated grounds we have found to be sufficient"; "[t]he fact remains plaintiff had the right to plead and attempt to prove the same theory as part of its original action").

**EXHIBIT G**

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

| | | |
|---|---|---|
| ROBERT MARK ROSEN, D.O., | ) | NO. AA 2236 |
| Petitioner, | ) | |
| BOARD OF MEDICAL EXAMINERS OF THE STATE OF IOWA, | ) | PETITIONER'S BRIEF AND REQUEST FOR ORAL ARGUMENT |
| Respondent | ) | |

Filed November 23, 1993.

* * * *

**III. THE STATE'S MOTION TO AMEND SHOULD HAVE BEEN DENIED AS UNTIMELY.**

* * * *

In its decision, the Board granted the motion on a reasoning that "[t]he applicant was prepared to address *the issue*", and therefore was not prejudiced by the timing of the motion, "because he was the one who raised [*the issue*]" (emphasis added). Record tab 15, pages 37-38. The issue raised by the motion was whether signing the application in blank equated to fraud in procuring a license. Rosen did *not* raise that issue.

The issue that Rosen raised, among others, was whether the allegedly fraudulent statement referenced in the original charge was knowingly and intentionally

false. The fact that Rosen signed the application in blank, with other facts, countered the original charge by demonstrating that the allegedly fraudulent statement in the application concerning the Knapp preceptorship was made on Rosen's behalf by Knapp, was thought by Knapp to be true, and thus was not knowingly and intentionally false.

Rule 106, Iowa Rules of Civil Procedure, in relevant part provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

This rule is identical to rule 15(b), Federal Rules of Civil Procedure.

The cases consistently apply these rules to deny amendment in circumstances substantially the same as those here. The cases are legion. *Allison-Kelsey Ag Center v. Hildebrand*, 485 N.W.2d 841, 846 (Iowa 1992) (denying amendment after the close of evidence when the trial testimony presented no surprises); *Mora v. Savereid*, 222 N.W.2d 417, 422-23 (Iowa 1974) (same); *Trask v. Gibbs*, 200 N.W.2d 565, 568-69 (Iowa 1972) (same); *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 815 (1988) ("there is simply no evidence of any consent among the parties to litigate the new patent-law claim"; "[t]rue, the

summary judgment papers focused almost entirely on the patent-law issues"; "[b]ut those issues fell squarely within the purview of the theories of recovery, defenses and counterclaims that the pleadings already encompassed"); *Dole v. Mr. W. Fireworks, Inc.*, 889 F.2d 543, 547 (5th Cir. 1989) ("[t]he evidence that Mr. W. alleges to have shown *implied* consent was also relevant to the other issues at trial and cannot be used to imply consent to try the present issue"; "[n]o good cause was shown for the distinctly belated raising of the [new] claim"); *Wesco Mfg. v. Tropical Attractions*, 833 F.2d 1484, 1487 (11th Cir. 1987) ("[t]he introduction of evidence arguably relevant to pleaded issues cannot serve to give a party fair notice that new issues are entering the case"); *Campbell v. Trustees*, 817 F.2d 499, 504 (9th Cir. 1987) ("[a]n amendment will be proper only if it is found that the parties expressly or impliedly consented for a trial of the issues not raised in the pleadings"; "it must appear that the party understood the evidence was introduced to prove the unpleaded issue"); *Pariser v. Christian Health Care Systems, Inc.*, 816 F.2d 1248, 1253 (8th Cir. 1987) ("we find nothing to indicate that Pariser intended to try a tortious-interference claim or that the defendant in any way consented to trial of such a claim"; "[w]hile Pariser did introduce some evidence that would be relevant to a tortious-interference claim, this evidence was also relevant to Pariser's other claims, so its introduction did not provide the defendant any notice that a claim for tortious interference . . . was being tried"); *Quillen v. International Playtex, Inc.*, 789 F.2d 1041, 1044 (4th Cir. 1986) ("[t]he case was simply not tried on that basis"); *Cioffe v. Morris*, 676 F.2d 539, 541-42 (11th Cir. 1982) ("implied consent

. . . will not be found if the defendant will be prejudiced; that is, if the defendant had no notice of the new issue, if the defendant could have offered additional evidence in defense, or if the defendant in some other way was denied a fair opportunity to defend"); *Jimeniz v. Tuna Vessel Granada*, 652 F.2d 415, 421 (5th Cir. 1981) ("[a]ll of the evidence upon which the court relied in finding the GRANADA unseaworthy was relevant . . . to the issue made in the pleadings"; "the introduction of such evidence gave this defendant no fair notice that new issues were thereby entering the case"; "the court abused its discretion in determining that the unpled issues on which it decided against the GRANADA were tried by its implied consent"); *Cook v. City of Price*, 566 F.2d 699, 702 (10th Cir. 1977) ("it would be unjust to the opposing party to consider a new theory of recovery after trial is complete"; "[t]his rule obtains because an opponent must be given a fair chance to plan his defense to meet pleaded allegations").

There is more to the matter than proper procedure. "Notice remains a first-reader element of procedural due process"; "each party is entitled to know what is being tried"; "trial by ambush is no more favored here than elsewhere". *Jimeniz v. Tuna Vessel Granada, supra*, 652 F.2d at 415. To comport with due process, a person must ordinarily be informed somehow of the issues involved in order to prevent surprise at the hearing and allow an opportunity to prepare. *Wedergren v. Board of Directors*, 307 N.W.2d 12, 16 (Iowa 1981). That is why the Board's rules require a statement of charges setting forth in ordinary and concise language the acts or omissions with which the respondent is charged, in sufficient detail to

enable the efficient preparation of the respondent's defense. I.A.C. § 653-12.50(11).[7]

A charged party must be given fair notice of the violations charged; the time for giving such notice is prior to the hearing; failure to provide such notice is not consonant with due process or fundamental fairness. *Boyle's Famous Corned Beef Co. v. National Labor Relations Bd.*, 400 F.2d 154, 163-65 (8th Cir. 1967). A respondent is entitled to know what he is on trial for. *Drug Packages, Inc. v. National Labor Relations Bd.*, 570 F.2d 1340, 1345 (8th Cir. 1978); *National Labor Relations Bd. v. Blake Construction Co.*, 663 F.2d 272, 280 (D.C. Cir. 1981).

The foregoing principles were applied in the context of physician licensure in *Weiner v. Board of Regents*, 158 N.Y.S.2d 730 (A.D. 1956). The original charge against the physician in that case was based on the physician's *prior conviction of income tax evasion*. The physician answered the charge with an explanation of the circumstances underlying the conviction. Among other things, he disclosed that a substantial portion of the income attributed to him for tax purposes had been paid to other physicians who referred patients to him. The licensing body suspended his license for *fee-splitting*. As here, it was argued on behalf of the State that the physician was "fully aware" of the "issues" and hence that the licensing body's action should be upheld. *Id.* at 733.

---

[7] While the rule perhaps has literal application only to proceedings on license revocations and suspensions, and not to proceedings on license denials, the constitutional principle it articulates is of general import.

The court rejected the argument. There was "nothing in any of the statements of the [licensing body] or the assistant attorney general who presented the case to it", the court said, "to suggest the [licensing body] was suggesting to the petitioner it deemed it had before it two charges, not one". *Id.* at 734. On the whole record, the court continued, the "petitioner or his counsel could not have known from the course of proceedings . . . that the issue which the [licensing body] 'deemed important' was not the charge it was trying, but another charge". *Id.* at 735. If the petitioner was to be disciplined for fee-splitting, the court held, "due process of law require[d] that he be charged with it in plain words and have a clear opportunity to meet it head on", "and not as a mere facet to another charge". *Id.* at 734, 735.

Preparation for hearing in this case, including extent of discovery, choice of witnesses, choice of exhibits, lines of inquiry and selection of arguments, was necessarily based on the charge as framed in the Board's response to Rosen's request for more definite statement. The hearing was conducted accordingly. The State's belated attempt to add an additional charge by amendment was based on evidence made known to the State six weeks prior to the hearing. Had the motion to amend been timely, Rosen could have altered his preparations to meet the new charge head on.

Because the additional charge was not tried with the consent of the parties, the Board necessarily abused its discretion in allowing the amendment. In addition, allowing the amendment denied Rosen first-reader notice and

an opportunity to prepare and present a defense. It thereby denied him due process of law.[8]

* * * *

/s/ Craig F. Graziano
/s/ Miriam S. Sawtelle
Attorneys for Robert
Mark Rosen, D.O.

---

[8] The Board compounds its error with the following statement: "Moreover, if the motion had been denied, the Board could have filed a [second] Complaint and Statement of Charges based upon the Applicant's signing the application in blank." Record tab 15, page 38. The doctrine of claim preclusion forbids that result. *Restatement, Second, of Judgments* § 25 and comment b (1982) ("[i]t is immaterial [and therefore does not avoid the preclusive effect of a prior judgment] that the plaintiff in the first action sought to prove acts relied on in the second action and was not permitted to do so because they were not alleged in the complaint and an application to amend the complaint came too late"). Iowa law accords with the *Restatement* view. *B & B Asphalt Co. v. T.S. McShane Co., supra,* 242 N.W.2d at 286-87 ("[c]laim preclusion . . . is based on the principle that a party may not split or try his claim piecemeal"; "[h]e does not get another day after the first lawsuit is concluded by giving a different reason than he gave in the first"; "[d]isallowance of the amendment did not occur on a ground of misjoinder but on unrelated grounds we have found to be sufficient"; "[t]he fact remains plaintiff had the right to plead and attempt to prove the same theory as part of its original action").

**EXHIBIT H**

BEFORE THE BOARD OF MEDICAL EXAMINERS

OF THE STATE OF IOWA

| | | |
|---|---|---|
| IN THE MATTER OF THE APPLICATION FOR LICENSURE OF ROBERT MARK ROSEN, D.O., RESPONDENT | * * * * | RESPONSE TO REQUEST FOR MORE DEFINITIVE STATEMENT NO. 03-92-095 |

Filed October 1, 1992.

COMES NOW Dennis M. Carr, Acting Executive Director for the Iowa Board of Medical Examiners, (hereafter the Board) and, pursuant to 653 I.A.C. 12.50(16) hereby responds to the REQUEST FOR MORE DEFINITIVE STATEMENT filed by Robert Mark Rosen, D.O., (hereafter the Respondent) in the above entitled action on September 21, 1992.

A. As part of an application for permanent Iowa osteopathic medical licensure the Respondent filed with the Board on or about July 23, 1991, in application section 11: "RESIDENCIES (Give places and dates of each service) I have served Residencies in the following hospitals:", the Respondent asserted that from July 1988 to June 1991, he served a preceptorship with "D. P. Knapp, M.D., Moline Derm.".

B. It has been determined that D. P. Knapp, M.D., aka David P. Knapp, M.D. only practiced at the Moline Dermatology Clinic for approximately three months between April 1989 and June 1990. Dr. Knapp did not

work at the clinic at all after June 1990. Therefore in application section 11 the Respondent failed to make full, complete and accurate disclosures.

C. That the Respondent's failure to make full, complete and accurate disclosures on his application for medical licensure constitutes fraud in procuring a license grounds for which a license could be suspended or revoked. See sections 147.4, 147.5(5) and 148.6 of the Code of Iowa and 653 I.A.C. 12.1, 12.2, 12.4, and 12.4(1).

/s/ DENNIS M. CARR
Acting Executive Director
Iowa State Board of
Medical Examiners

Supreme Court, U.S.
FILED
FEB 20 1996
CLERK

No. 95-1168

In The

# Supreme Court of the United States

October Term, 1995

ROBERT MARK ROSEN, D.O.,

*Petitioner,*

v.

IOWA BOARD OF MEDICAL EXAMINERS,

*Respondent.*

**Petition For Writ Of Certiorari To The Supreme Court Of Iowa**

## RESPONDENT'S BRIEF IN OPPOSITION

THOMAS J. MILLER
Attorney General of Iowa

*GORDON E. ALLEN
Deputy Attorney General

MAUREEN McGUIRE
Assistant Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
(515) 281-8760
(515) 281-4209 (FAX)

Counsel for Respondent

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... ii

STATEMENT OF THE CASE ..... 1

SUMMARY OF THE ARGUMENT ..... 3

REASON FOR DENYING THE WRIT ..... 3

THE IOWA SUPREME COURT'S DECISION ALLOWING THE AMENDMENT TO THE CHARGES DID NOT VIOLATE DUE PROCESS AND DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS. NO IMPORTANT FEDERAL QUESTION IS PRESENTED ..... 3

CONCLUSION ..... 6

# TABLE OF AUTHORITIES

Page

CASES

*Abercrombie v. Clark*, 920 F.2d 1351 (7th Cir. 1990), *cert. denied*, 502 U.S. 809 (1991) ..... 3

*Cole v. Layrite Products Co.*, 439 F.2d 958 (9th Cir. 1971) ..... 4

*Dole v. Arco Chemical Co.*, 921 F.2d 484 (3rd Cir. 1990) ..... 3, 4

*Donovan v. Royal Logging Co.*, 645 F.2d 822 (9th Cir. 1981) ..... 4

*Foman v. Davis*, 371 U.S. 178 (1962) ..... 3, 4

*Mineral Industries & Heavy Construction Group v. OSHA*, 639 F.2d 1289 (5th Cir. 1981) ..... 3

*Rabenovets v. Crossland*, 137 F.2d 675 (D.C. Cir. 1943) ..... 4

*Rosen v. Board of Medical Examiners of the State of Iowa*, 539 N.W.2d 345 (Iowa 1995) ..... 2

*Street v. New York*, 394 U.S. 576 (1969) ..... 5

*Yellow Freight System Inc. v. Martin*, 954 F.2d 353 (6th Cir. 1992) ..... 4, 5

STATUTES

28 U.S.C.A. § 1257 (West 1993) ..... 5

Iowa Code § 258A.10 (1991) ..... 1

653 Iowa Admin. Code 12.4(1) ..... 1

OTHER

3 J. MOORE, R. FREER, MOORE'S FEDERAL PRACTICE ¶ 15.02[1] (2d ed. 1990) ..... 4

## STATEMENT OF THE CASE

The Petitioner, Dr. Rosen, D.O., applied for a license to practice medicine in Iowa. The Respondent, Iowa Board of Medical Examiners, denied his application for failure to make full, complete and accurate disclosures on his application which failure constituted fraud in procuring a license under rules of the Board. (Pet. App. 57-58)

Rosen appealed this denial and an administrative hearing was held before the Board of Medical Examiners. During the hearing, Rosen testified that he did not complete the license application himself. Rather, Rosen signed a blank application and another physician completed it and submitted it to the Board, without having Rosen review the completed form.

At the close of the hearing, the State moved to amend the charge to include Rosen's signing the blank application as further evidence of fraud in procuring a license. Rosen objected to this amendment, but did not ask for a continuance. The Board granted the motion to amend. (Pet. App. 33-39)

The Board denied Rosen's application for license finding that he "violated Iowa Code section 258A.10 (1991) as defined by 653 Iowa Admin. Code 12.4(1), when he intentionally perverted the truth in making his application for medical licensure in Iowa, by signing the attestation on the application form when the form was blank, and he failed to subsequently review the answers on the form for their truthfulness. As a result, the application contained false information." (Pet. App. 39)

Rosen subsequently filed an Application for Rehearing. In his Application, Rosen alleged that the Board's findings violated his right to equal protection and he wanted to conduct discovery to address that claim. (Pet. App. 27-28) The Board denied his Application for Rehearing but did invite Rosen to "submit a new, completed application for consideration." (Pet. App. 41)

Instead, Rosen filed a Petition for Judicial review of the Board's decision in the Iowa District Court for Polk County. (Pet. App. 16, 50). He alleged, among other claims, that the Board violated his right to due process by allowing the complaint to be amended. He also asserted that his right to equal protection was denied by the Board's denial of his request for a rehearing. (Pet. App. 26-27, 50-56). The district court affirmed the action of the Board. The court also found that allowing the amendment was not contrary to law. (Pet. App. 26-27) The district court found that Rosen had waived the equal protection issue.

Rosen sought review of the district court's decision. The Iowa Supreme Court affirmed the district court finding that there was no denial of due process by allowing the amendment. *Rosen v. Board of Medical Examiners of the State of Iowa*, 539 N.W.2d 345 (Iowa 1995). (Pet. App. 6) The court also found that the Board did not err in denying Rosen's application for rehearing. (Pet. App. 13-14)

## SUMMARY OF THE ARGUMENT

The Iowa Supreme Court's ruling is not in conflict with decisions of this Court and does not raise a substantial federal question. This Court and the courts of appeal are in agreement that administrative complaints may be amended freely without violating due process.

To the extent Rosen claims the Board's failure to grant a rehearing constituted a due process violation, that claim was not presented to or ruled on by the Iowa Supreme Court. This Court lacks jurisdiction on that issue.

## REASON FOR DENYING THE WRIT

### THE IOWA SUPREME COURT'S DECISION ALLOWING THE AMENDMENT TO THE CHARGES DID NOT VIOLATE DUE PROCESS AND DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS. NO IMPORTANT FEDERAL QUESTION IS PRESENTED.

It is widely accepted that administrative pleadings are liberally construed and easily amended. *See Foman v. Davis*, 371 U.S. 178 (1962); *Abercrombie v. Clark*, 920 F.2d 1351, 1360 (7th Cir. 1990), *cert. denied*, 502 U.S. 809 (1991); *Dole v. Arco Chemical Co.*, 921 F.2d 484, 487 (3rd Cir. 1990); *Mineral Industries & Heavy Construction Group v. OSHA*, 639 F.2d 1289, 1292 (5th Cir. 1981). An agency may amend its complaint after the commencement of a hearing. Failure to allow the agency to amend complaints can constitute an abuse of discretion, absent unusual circumstances. *Dole v. Arco Chemical Co.*, 921 F.2d 484, 488 (3rd Cir. 1990).

Allowing amendment does not violate due process unless the non-moving party would be prejudiced. *See Foman v. Davis*, 371 U.S. 178 (1962); *Donovan v. Royal Logging Co.*, 645 F.2d 822, 827 (9th Cir. 1981). To establish prejudice, the non-moving party must demonstrate that it "was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendments been timely." *Dole v. Arco Chemical Co.*, 921 F.2d 484, 488. A mere claim of prejudice is not enough. *Id.*

Rosen has made no showing that he was prejudiced by allowing the amendment. Rosen himself raised the issue of signing the blank application. He placed the issue before the Board as his defense. *See Cole v. Layrite Products Co.*, 439 F.2d 958, 961 (9th Cir. 1971) (amendments that include issues that were inferentially raised by incidental evidence in the record are precluded). As Rosen introduced this issue in his defense, he cannot claim to be surprised or prejudiced by the Board's amending the charges to include it.

Even in those cases where a party can demonstrate actual prejudice, the amendment may still be permitted and the party granted a continuance in order to address the amendment. *See* 3 J. MOORE, R. FREER, MOORE'S FEDERAL PRACTICE ¶ 15.02[1] (2d ed. 1990). A failure to ask for a continuance supports a finding of no prejudicial error. *See Rabenovets v. Crossland*, 137 F.2d 675, 676 (D.C. Cir. 1943). Rosen did not ask for a continuance. He cannot now claim prejudice.

Rosen argues that the Iowa Supreme Court decision conflicts with the decision in *Yellow Freight System Inc. v.*

*Martin*, 954 F.2d 353 (6th Cir. 1992), but fails to specify how the decisions are in conflict. They are not.

In *Yellow Freight*, the court found a due process violation when the agency gave notice of violation of section 405(b) but in its ruling found a violation of a completely different regulation, 405(a). The agency reasoned that the company had impliedly consented to litigate 405(a) by virtue of the evidence it submitted. At no time did the agency give notice to the company that it was amending its notice. *Id.* at 358.

Unlike *Yellow Freight*, Rosen was notified of the amendment at the end of the hearing and had an opportunity to respond or move to continue. In addition, the amendment in *Yellow Freight* dealt with a completely new regulation. The charges against Rosen did not change. He was still charged only with "fraud in procuring a license." As stated by the Iowa Supreme Court, "[t]he amendment merely enlarged the factual basis supporting the charge. It neither altered the legal issues presented nor subjected Rosen to new and distinct charges." (Pet. App. 5)

Rosen now raises for the first time whether the refusal to allow him to enlarge his defense through a Motion for Rehearing violated due process. This issue was not addressed by the Iowa Supreme Court. This Court has no jurisdiction. *See* 28 U.S.C.A. § 1257 (West 1993); *Street v. New York*, 394 U.S. 576, 582 (1969).

The Iowa court answered in the negative the claim that Rosen was denied his right to equal protection by the Board's decision, not due process. (Pet. App. 13-14) Because due process was not raised by Rosen or ruled on

by the Iowa Supreme Court, this Court has no jurisdiction.

## CONCLUSION

For the above stated reasons, the Iowa Board of Medical Examiners respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

*GORDON E. ALLEN
Deputy Attorney General

MAUREEN McGUIRE
Assistant Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
(515) 281-8760
(515) 281-4209 (FAX)

Counsel for Respondent

*Counsel of Record

Supreme Court, U.S.
FILED
FEB 28 1996
CLERK

No. 95-1168

In The

# Supreme Court of the United States

October Term, 1995

ROBERT MARK ROSEN, D.O.,

*Petitioner,*

v.

IOWA BOARD OF MEDICAL EXAMINERS,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court Of Iowa**

## REPLY TO BRIEF IN OPPOSITION

Craig F. Graziano,
Counsel of Record
James W. O'Brien
Dickinson, Mackaman, Tyler & Hagen, P.C.
1600 Hub Tower
699 Walnut Street
Des Moines, Iowa 50309-3986
(515) 244-2600
Fax (515) 246-4550

*Counsel for Petitioner*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## REPLY TO BRIEF IN OPPOSITION

**1. The Court has jurisdiction to consider Rosen's claim.** The Board argues (pp. 5-6) that Rosen did not on due process grounds challenge, and hence that the Court lacks jurisdiction to consider whether Rosen's due process rights were violated by, *the Board's denial of Rosen's request for rehearing*. The argument forsakes the forest for a tree. The Board does not question the Court's jurisdiction to consider whether Rosen's due process rights were violated by the state's failure to give Rosen timely notice of the real charge against him or by the Board's allowance of the state's amendment. Nor could such a question legitimately be raised. Rosen's due process claim forever was[1] and is[2] that the state gave him no notice of the real charge against him prior to trial and instead, by its inexcusably late amendment, changed – or, as the state supreme court phrased it, "enlarged" – the issue after the trial was over, thereby denying him an opportunity to prepare and present a responsive defense to the real charge against him at trial, in violation of his rights to procedural due process as secured by the Fourteenth Amendment. As the state supreme court recognized by considering the issue (App. 5-6), Rosen's due process

---

[1] See pp. 4-5, 5 n.1, 6-7 and App. 42-56 of the petition for writ of certiorari.

[2] See summary of argument at 14-15 and parts C, A and B of petition for writ of certiorari, including captions to parts C, A and B.

claim was well preserved. It is therefore within the Court's jurisdiction.[3]

**2. The fact that Rosen did not request a continuance (after the close of the evidence) does not defeat his claim.** Citing 3 J. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 15.02[1] (2d ed. 1990), the Board for the first time argues (p. 4) that Rosen forfeits relief because he did not request a continuance. The argument lacks merit. At the time the state offered its amendment, the evidence had already closed. There was nothing left to continue. The cited section from MOORE makes it clear, moreover, that disposition does not turn on the isolated fact that a party did or did not request a continuance. The cited section rather stresses the inter-relationship of the concepts addressed in federal rules of civil procedure 15 and 16, governing amendment and pre-trial conference, respectively, which enable an adjudicatory body "to have the pleadings amended so that the real, disputed issues are

---

[3] The portion of Rosen's argument addressing the request for and denial of rehearing is included in the petition for writ of certiorari (pp. 20-21) for two reasons. First, pertinent to the constitutional merits, it illustrates that Rosen had a responsive defense to the real charge against him that he could have prepared and presented at trial if the state had given him notice of the real charge against him prior to trial – and hence shows that Rosen was prejudiced by the absence of notice. Second, pertinent to the Court's decision whether to grant the petition, it illustrates how differently the lower tribunals treated the state (amendment granted) and Rosen (rehearing denied) – and hence, in combination with other factors, helps supply the compelling reasons that must be supplied in order for the petition to be granted. See rule 10 ("[a] petition for certiorari writ will be granted only for compelling reasons").

clearly formulated". In Rosen's case, it was Rosen who sought to effectuate that end by requesting an informal conference and therein disclosing the relevant circumstances. It was the state that subverted that end by withholding amendment until after the close of the evidence. Even more fundamentally, the cited section from MOORE stresses the need to consider the concepts of federal rule of civil procedure 1, among them the concept that procedural issues should be resolved in ways that secure just determinations. The Board says little or nothing about justice.

**3. Rosen did not receive "inferential" notice of the real charge against him.** The Board (p. 4) for the first time cites *Cole v. Layrite Products Co.*, 439 F.2d 958, 961 (9th Cir. 1971). *Cole* affirmed the refusal of an amendment to include an issue first mentioned during argument to the jury. The court said: "rule [15(b)] does not permit amendments to include issues which may be inferentially suggested by incidental evidence in the record". As nearly as Rosen can determine from the brief in opposition, the Board is arguing (1) that rule 15(b) as interpreted by *Cole* does permit amendments to include issues which may be inferentially suggested by *non-incidental* evidence in the record and (2) that the evidence that Rosen signed the application in blank was offered by Rosen himself and was therefore *non-incidental*. Such an argument reads more into *Cole* than is there. *Cole* simply held that amendment was properly refused. It supports Rosen. The concept of "notice by inference" is fraught with difficulty. In this case, there was nothing that would reasonably have led Rosen to infer that the state would allege that the naked signing of a document in blank is without more

fraudulent. That allegation is without precedent in Iowa and is contrary to decisional law elsewhere.[4] Particularly when the state seeks to level so novel an allegation, due process requires that notice be given.

Respectfully submitted,

CRAIG F. GRAZIANO,
Counsel of Record
JAMES W. O'BRIEN
DICKINSON, MACKAMAN, TYLER
& HAGEN, P.C.
1600 Hub Tower
699 Walnut Street
Des Moines, Iowa 50309-3986
(515) 244-2600
Fax (515) 246-4550

*Counsel for Petitioner*

---

[4] See, *e.g.*, *Mannan v. District of Columbia Board of Medicine*, 558 A.2d 329, 340 (D.C. 1989) (although physician showed poor judgment when he signed 1,400 Medicaid billing forms and left completion of details to others, there was no substantial evidence of willful overbilling).